[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION . . . . . APPELLANT;
RESPONDENT,

AND

MUNRO . . . . . RESPONDENT.
APPELLANT,

THE BRITISH IMPERIAL OIL COMPANY LIMITED . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

Income Tax—Assessment—Board of Review—Validity of constitution of Board—Judicial power of Commonwealth—Retrospective legislation—Past decisions of Board of Appeal—Appeal to High Court—Law imposing taxation—Different subjects of taxation—Tax on person in respect of business carried on abroad—Deductions from taxable income—Interest actually incurred in producing assessable income—Interest on mortgage debt—Money borrowed not used to produce income—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 55, 71—*Income Tax Assessment Act* 1922-1924 (*No.* 37 *of* 1922—*No.* 51 *of* 1924), *secs.* 4, 17, 23 (1) (*e*), (3), 28, 41, 50, 51—*Income Tax Assessment Act* 1922-1925 (*No.* 37 *of* 1922—*No.* 28 *of* 1925), *secs.* 17, 21, 23 (1) (*e*), 28, 41, 44, 50, 51, 51A—*Income Tax Assessment Act* 1925 (*No.* 28 *of* 1925), *secs.* 16, 17, 18, 19, 21, 22, 24—*Income Tax Act* 1922 (*No.* 38 *of* 1922)—*Income Tax Act* 1923 (*No.* 26 *of* 1923)—*Income Tax Act* 1924 (*No.* 50 *of* 1924).

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MELBOURNE, *May* 10-12, 14, 17; *Aug.* 25.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ.

May 31; *Aug.* 25.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Held, by *Isaacs, Higgins, Gavan Duffy, Rich* and *Starke* JJ. (*Knox* C.J. dissenting), that the powers which the *Income Tax Assessment Act* 1922-1925,

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by secs. 44, 50 and 51, purports to confer upon a Board of Review created under sec. 41 of the Act are not part of the judicial power of the Commonwealth, which, under sec. 71 of the Constitution, can only be vested in the High Court or a Federal Court; that those sections of the Assessment Act are not an attempt by the Commonwealth Parliament to exercise the judicial power of the Commonwealth, and that those sections are not on either of those grounds invalid.

Held, also, by *Isaacs, Gavan Duffy, Rich* and *Starke* JJ., that by secs. 18 and 19 of the *Income Tax Assessment Act* 1925 jurisdiction is validly conferred on the High Court to entertain an appeal by the Commissioner of Taxation from the decision of a Board of Appeal constituted under the *Income Tax Assessment Act* 1922-1924.

Held, further, by *Isaacs, Higgins, Gavan Duffy, Rich* and *Starke* JJ., (1) that neither the *Income Tax Assessment Act* 1922-1924 nor the *Income Tax Assessment Act* 1922-1925, nor either of the Income Tax Acts which incorporate those Assessment Acts, is obnoxious to any of the provisions of sec. 55 of the Constitution; and (2) that sec. 28 of the *Income Tax Assessment Act* 1922-1925 is not extra-territorial in its operation and is valid.

British Imperial Oil Co. Ltd. v. *Federal Commissioner of Taxation*, (1925) 35 C.L.R. 422, discussed.

Held, further, by *Knox* C.J., *Isaacs, Higgins, Rich* and *Starke* JJ., that, where money borrowed on the security of rent-producing property is used for a purpose whereby no income is produced, the interest paid thereon is not a permitted deduction under sec. 23 (1) (3) of the *Income Tax Assessment Act* 1922-1925.

APPEALS from Board of Appeal and Case Stated.

During the years 1920-1921 and 1921-1922 James Angus Munro carried on business in Melbourne as a bedding manufacturer, motor-car importer, spring manufacturer and indentor, and he also owned certain freehold land in Elizabeth Street, Melbourne, upon which buildings were erected, part of which was leased to tenants. With the object of starting another business in Sydney Munro caused a company to be incorporated with a capital of £20,000 divided into 20,000 shares of £1 each. Of these shares 2,000 were allotted to Munro and 9,000 to each of his two sons. Munro also advanced certain money to the company without interest. In order to provide for the payment of the 20,000 shares and for the advance to the company, Munro borrowed from the London Bank of Australia Ltd., on overdraft, about £30,000, the repayment of which with interest was secured by mortgage of the Elizabeth Street property. In his Federal

income tax returns for the years 1921-1922 and 1922-1923 Munro claimed as a deduction the interest paid to the Bank during the relevant periods on the amount so borrowed. The Commissioner of Taxation having disallowed his claim, Munro appealed to the Board of Appeal in respect of each year, and the Board of Appeal in each case reversed the Commissioner's decision. From the decisions of the Board of Appeal the Commissioner, by notices of appeal dated 17th February 1925, appealed to the High Court.

On an appeal to the Supreme Court of Victoria by the British Imperial Oil Co. Ltd. from an assessment for Federal income tax for the year 1924-1925, *Macfarlan* J. stated for the opinion of the High Court, pursuant to sec. 51A of the *Income Tax Assessment Act* 1922-1925, a case which was substantially as follows :—

1. (a) On 28th March 1925 the Federal Commissioner of Taxation caused to be given to James L. Kirkland, the Public Officer of the above-named appellant, a notice in writing of an assessment under the *Income Tax Assessment Act* 1922-1924 in respect of the financial year 1924-1925. (b) The said assessment was made in purported exercise of the authority conferred upon the respondent by sec. 28 of the *Income Tax Assessment Act* 1922-1924.

2. The appellant was dissatisfied with the said assessment and on 4th May 1925, pursuant to sec. 50 of the said Act, duly lodged with the Commissioner an objection in writing against the said assessment.

3. On 1st December 1925 the Commissioner gave to the appellant notice in writing that its objection to assessment had been disallowed.

4. On 24th December 1925 the said appellant, pursuant to sec. 50 (4) of the *Income Tax Assessment Act* 1922-1925, in writing requested the respondent to treat its objection as an appeal and to forward it to the Supreme Court of the State of Victoria.

5. Pursuant to such request the Commissioner on 29th April 1926 forwarded the said objection to this Court.

6. On the hearing of the said appeal the following contentions were made on behalf of the appellant and denied on behalf of the Commissioner : (i.) That sec. 28 of the *Income Tax Assessment Act* 1922-1924, and the Income Tax Acts so far as they operate thereon,

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were and are invalid and inoperative; (ii.) that the said provisions as amended by the *Income Tax Assessment Act* 1925 were and are void and inoperative; (iii.) that sub-sec. 3 of sec. 28 of the *Income Tax Assessment Act* 1922-1924 was and is inoperative and invalid and inseverable from the other provisions of the said sec. 28; (iv.) that upon the appellant's dissatisfaction aforesaid the said assessment ceased to impose any liability upon the appellant; (v.) that the *Income Tax Assessment Act* 1925 did not validly impose or enable to be imposed any liability upon the appellant in respect of income tax; (vi.) that the *Income Tax Assessment Act* 1925 or, alternatively, secs. 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20 and 21 thereof is or are invalid and inoperative; (vii.) that the said sections, other than secs. 16 and 17, are invalid and inoperative and are inseverable from the said secs. 16 and 17; (viii.) that the *Income Tax Assessment Act* 1922-1924, and the Income Tax Acts so far as they operate thereon, were and are invalid and inoperative; (ix.) that the *Income Tax Assessment Act* 1922-1924 as amended by the *Income Tax Assessment Act* 1925, and the Income Tax Acts so far as they operate thereon, were and are invalid and inoperative.

The questions for the Court were :—

(1) Did the said assessment cease to be valid or inoperative upon the arising of the dissatisfaction of the appellant therewith ?

(2) Is the assessment appealed against good in law ?

May 10-12, 14, 17.

The questions of law common to the two appeals and to the case stated were argued before *Knox* C.J., *Isaacs*, *Higgins*, *Gavan Duffy*, *Rich* and *Starke* JJ.

Owen Dixon K.C. (with him *Robert Menzies* and *Norris*), for the respondent Munro, and (with him *Robert Menzies*) for the appellant the British Imperial Oil Co. Sec. 28 of the *Income Tax Assessment Act* 1922-1924 is wholly invalid because it is so bound up with the provisions of the Act for a Board of Appeal that it cannot be severed from those provisions, and those provisions have been held to be invalid (*British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (1); see also *Federal Commissioner of Taxation* v. *Australian*

(1) (1925) 35 C.L.R. 422.

Tesselated Tile Co. (1)). The right given by sec. 28 (3) to have a reference to a Board of Appeal is so intimately connected with the liability imposed by sec. 28 (1) that if the right goes the liability also goes. The same reasoning applies to make secs. 17 and 21 invalid. The reason of the invalidity of the provisions as to Boards of Appeal is that the Parliament purported to vest in those Boards part of the judicial power of the Commonwealth contrary to the provisions of Chapter III. of the Constitution (see *New South Wales* v. *Commonwealth* (2); *Waterside Workers' Federation* v. *J. W. Alexander Ltd.* (3); *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (4); *Porter* v. *The King*; *Ex parte Yee* (5)). The provisions of the *Income Tax Assessment Act* 1925 as to a Board of Review are invalid for the reason that the Board is given judicial powers. The powers are judicial because the Board has to ascertain rights as they exist according to law and to ascertain those rights at the instance of the party who puts the Board in motion for the purpose of determining his liability, and when the determination is made the party's rights are established conclusively. The test of judicial power is not the name, description or character of the body exercising the power, but whether a *lis* may be taken as of right to that body to obtain a conclusive determination. In the scheme for Boards of Review in the Assessment Act 1925 are all the constituent elements for the exercise of judicial power, namely, *actor* (the taxpayer), *reus* (the Commissioner) and *judex* (the Board of Review), and a conclusive determination. Sec. 51 of the Assessment Act 1922-1925 gives the Board of Review powers substantially identical with those given by sec. 51A to the Supreme Court of a State, and the Commonwealth Parliament cannot confer upon the Supreme Court of a State appellate jurisdiction in matters not judicial. When the conclusion is reached that the character of an act is judicial, it does not matter by whom the act is done. On the view that the Board of Review is an administrative body, an appeal does not lie to the High Court in its appellate jurisdiction. But sec. 51 (6) clearly indicates that the intention is to give an appeal to the High Court in its appellate jurisdiction,

(1) (1925) 36 C.L.R. 119.
(2) (1915) 20 C.L.R. 54.
(3) (1918) 25 C.L.R. 434, at pp. 436, 490.
(4) (1909) 8 C.L.R. 330.
(5) (1926) 36 C.L.R. 432.

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for the function given to the High Court is to correct the errors of the Board of Review, not to determine for itself the matter which came before the Board. Sec. 18 of the Assessment Act 1925 purports to authorize a thing which at the time it was done was not and could not be authorized because it was contrary to the Constitution. The test of the validity of retrospective legislation is whether the legislature might have done prospectively what it has attempted to do retrospectively (*Williams* v. *Supervisors of Albany* (1)). If the provisions dealing with the Board of Appeal in the Assessment Act 1925 are to be read as directing that that Board was not a body whose duty it was to ascertain income but was certain persons who had expressed opinions, then the tax imposed becomes a tax, not upon income but upon persons in reference to those opinions. If those provisions are to be read as then imposing a tax upon particular persons who had what the Board of Appeal said was income, then the Act is an Act imposing taxation and is obnoxious to the provisions of sec. 55 of the Constitution. Secs. 3, 5, 6 (*i*), 7, 9 and all the following sections, except secs. 22 and 23, of the Assessment Act 1925 are interdependent, and if one falls all of them fall. A liability imposed by the opinion of the Commissioner is quite different from a liability imposed by that opinion subject to appeal to the Board of Review, and the provisions as to the Board of Review are just as invalid as those as to the Board of Appeal. Sec. 28 of the Assessment Act 1922-1925 deals with a subject of taxation different from that dealt with by the rest of the Act, and so infringes sec. 55 of the Constitution. If the tax dealt with in sec. 28 is an income tax, the section is extra-territorial in its application and is void on that ground. A law imposing taxation within the meaning of sec. 51 of the Constitution is a law which actually lays the duty to pay upon a person. If that is so, sec. 22 of the Assessment Act 1925 is a law imposing taxation, for up to the time that Act was passed the persons to whom it applies were not liable to the tax imposed by the relevant Income Tax Acts and only became so liable upon the Act being passed. The same reasoning applies to make sec. 16 of that Act a law imposing taxation. If while a taxing Act is in operation the machinery provisions are so altered by another

(1) (1887) 122 U.S. 154, at p. 164.

Act as to include a class of persons who previously were not taxable, the latter Act is a law imposing taxation. [Counsel also referred to *Ex parte Simon* (1).]

Sir Edward Mitchell K.C., *Keating* and *Herring*, for the Commissioner. The powers given by sec. 51 (II.) and (XXXIX.) of the Constitution should be interpreted in relation to methods or schemes of legislation for taxation prevailing at the time of Federation in Great Britain and the Australian Colonies (*Australian Steamships Ltd.* v. *Malcolm* (2); *Harding* v. *Federal Commissioner of Taxation* (3)). In such schemes as regards income tax, customs and excise duties, &c., it was the practice to have provisions whereby questions as to liability to taxation were to be decided by bodies which were not Courts but whose determinations were final and conclusive and sometimes without recourse to a Court. So interpreted, there is power under sec. 51 (II.) and (XXXIX.) to create similar bodies which are not Courts within Chapter III. of the Constitution, and neither the Boards of Appeal nor the Boards of Review were or are such Courts. There is nothing in the Constitution which makes the legislative, executive and judicial powers of the Commonwealth mutually exclusive. There are no sharp lines dividing them from one another (see *Local Government Board* v. *Arlidge* (4); *Wilson* v. *Esquimalt and Nanaimo Railway Co.* (5); *Willoughby's Constitutional Law of the United States*, vol. I., p. 369; vol. II., pp. 1261, 1262). Judicial power involves the power to enforce determinations.

[HIGGINS J. referred to *Virginia* v. *West Virginia* (6).]

The constitution of the Boards of Review by the Assessment Act 1925 meets the criticisms of the Boards of Appeal contained in *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (7), and their powers are not judicial. There being power in the Commonwealth Parliament to pass retrospective legislation (*R.* v. *Kidman* (8)), the Assessment Act is to be treated, so far as Boards of Review are concerned, as having originally been in its present

(1) (1888) 4 T.L.R. 754.
(2) (1914) 19 C.L.R. 298, at pp. 328, 338, 340.
(3) (1917) 23 C.L.R. 119, at p. 130.
(4) (1915) A.C. 120.
(5) (1922) 1 A.C. 202, at p. 211.
(6) (1918) 246 U.S. 565, at p. 591.
(7) (1925) 35 C.L.R. 422.
(8) (1915) 20 C.L.R. 425.

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form and as having been in that form incorporated in each of the Income Tax Acts of the years 1922, 1923 and 1924. In the *Imperial Oil Co.'s Case*, even if the contention is right that the invalidity of sub-sec. 3 of sec. 28 of the Assessment Act 1922-1924 had the effect of nullifying the whole of sec. 28, sec. 16 of the Assessment Act 1925 makes the assessment of the Commissioner valid. In that view it becomes unnecessary to consider the effect of secs. 17 and 18 of the Assessment Act 1925. But sub-sec. 3 of sec. 28 of the Assessment Act 1922-1924 is severable from the rest of the section. Sec. 28 of the Assessment Act 1922-1924 is not obnoxious to the provisions of sec. 55 of the Commonwealth. The Tax Act, which incorporates the Assessment Act, is the law which imposes taxation, not the Assessment Act. Sec. 28 does not deal with a different subject of taxation from the rest of the Act, but is a proper provision in an Act dealing with income tax (see *Osborne* v. *Commonwealth* (1); *G. G. Crespin & Son* v. *Colac Co-operative Farmers Ltd.* (2); *National Trustees, Executors and Agency Co. of Australasia* v. *Federal Commissioner of Taxation* (3); *Harding* v. *Federal Commissioner of Taxation* (4)). The doctrines of *res judicata* or estoppel of record have no application, for in *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (5) nothing was determined between the parties: the appeal was struck out as incompetent. In the present *British Imperial Oil Co.'s Case* the first question asked should be answered in the negative. The objection of the Company was lodged before the Assessment Act 1925 was passed and pursuant to sec. 50 of the Assessment Act 1922-1924. The Company was not a "dissatisfied" taxpayer within sec. 28 (3), and, in taking the course it did, it objected as to an ordinary assessment. But only a "dissatisfied" taxpayer assessed under sec. 28 and attempting to proceed under sub-sec. 3 could by his dissatisfaction cause his assessment to cease to be valid or operative (*British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (6); *Federal Commissioner of Taxation* v. *Australian Tesselated Tile Co. Pty. Ltd.* (7)). If sec. 28 was invalid, it was invalid for all purposes and could not be relied

(1) (1911) 12 C.L.R. 321, at p. 372.
(2) (1916) 21 C.L.R. 205.
(3) (1916) 22 C.L.R. 367, at p. 375.
(4) (1917) 23 C.L.R., at p. 128.
(5) (1925) 35 C.L.R. 422.
(6) (1925) 35 C.L.R., at pp. 440, 441.
(7) (1925) 36 C.L.R. 119.

on by a dissatisfied taxpayer to invalidate his assessment. The second question should be answered in the affirmative. By force of secs. 7 and 24 of the Assessment Act 1925, sec. 28 of the Assessment Act 1922-1924 is to be read as if at all times since 1922 it consisted of sub-secs. 1 and 2 only. So read, the assessment thereunder is valid and is operative subject only to the provisions of Part V. relating to objections and appeals. Sec. 28 does not, by itself, impose taxation on a new subject matter. It provides the standard by which the Commissioner can fix the taxable income (*Stephens* v. *Abrahams* [*No.* 2] (1)). In the same way secs. 16 and 22 of the Assessment Act 1925 merely define the area of incidence of existing taxation.

Owen Dixon K.C., in reply. Sec. 28 (3) of the Assessment Act 1922-1924 is bound up with sec. 11 of the Assessment Act 1925, which substitutes a new sub-sec. 4 in sec. 50 of the former Act. The new par. 4 applies only to decisions, &c., under secs. 17, 21, 23 and 28 of the Assessment Act 1922-1924. Sec. 28 imposed liability until the Commissioner's assessment should be upset. To contend that the dissatisfied taxpayer should have required under sub-sec. 3 of sec. 28 a reference to the Board of Appeal is to contend that the invalid sub-sec. 3 is inseverable. The Assessment Act 1925 is obnoxious to sec. 55 of the Constitution. It not only amends the Assessment Act 1922-1924, but it also amends the respective Taxing Acts for the years 1922 to 1924, for it increases the class of persons upon whom the earlier Taxing Acts operated. The Taxing Acts are void because they incorporate sec. 28 as well as the other sections of the Assessment Act. Under sec. 28 the hypothesis is that there is no taxable income. Upon that hypothesis sec. 28 taxes a person who is not necessarily beneficially interested in the income. The tax imposed by sec. 28 is a tax upon the gross receipts of a business levied upon the person who carries it on irrespective of whether he has a beneficial interest in it.

[ISAACS J. referred to the definition of "taxable income" in sec. 4 of the Assessment Act 1922-1924 and to the prefatory words of that section, "unless the contrary intention appears."]

(1) (1903) 29 V.L.R. 229; 24 A.L.T. 216.

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The Legislature, in imposing the tax by the Taxing Act, relied upon the Assessment Act to deal with net income. [Counsel also referred to *R.* v. *Woodhouse* (1); *In re Clifford and O'Sullivan* (2).]

Cur. adv. vult.

The merits of *Munro's Case* were argued before *Knox* C.J., *Isaacs*, *Higgins*, *Rich* and *Starke* JJ.

Sir Edward Mitchell K.C. The money borrowed by Munro was used, not for the purpose of producing assessable income, but to pay for shares in the company, and therefore the interest paid on it cannot be said to have been "actually incurred in gaining or producing the assessable income," within the meaning of sec. 23 (1) of the Assessment Act 1922-1924. The interest which Munro paid was in no way attributable to the production of the income in respect of which Munro was assessed.

Owen Dixon K.C. The question whether the interest was actually incurred in gaining or producing the assessable income is one entirely of fact (*Usher's Wiltshire Brewery Ltd.* v. *Bruce* (3)). The appeal given by sec. 50 of the Assessment Act 1922-1924 is on a question of law. The burden is on the Commissioner of establishing that the decision of the Board was erroneous. The money borrowed was by the mortgage charged upon the rent-producing property, and unless the interest were paid the income would not be received. The purpose for which the borrowed money was used is immaterial in determining whether the interest paid for it was deductible. [Counsel also referred to *Farmer* v. *Scottish North American Trust* (4); *Sugden* v. *Leeds Corporation* (5); *Vallambrosa Rubber Co.* v. *Inland Revenue* (6).]

Cur. adv. vult.

Aug. 25.

The following written judgments were delivered :—

KNOX C.J. *Federal Commissioner of Taxation* v. *Munro* (Law Points).—These are appeals under sec. 51 (6) of the *Income Tax Assessment Act* 1922-1925 from decisions of the Board of Appeal

(1) (1906) 2 K.B. 501.
(2) (1921) 2 A.C. 570.
(3) (1915) A.C. 433, at p. 467.
(4) (1912) A.C. 118, at p. 127.
(5) (1914) A.C. 483, at pp. 490, 494.
(6) (1910) Sess. Cas. 519; 5 Tax Cas. 529.

constituted by the *Income Tax Assessment Act* 1922-1923, and the first question for decision by the Full Bench is whether the appeals are competent. In the case of *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (1) this Court held that Parliament had by the Act of 1922-1923 purported to confer on the Board of Appeal powers which were part of the judicial power of the Commonwealth; that by sec. 71 of the Constitution such power could only be vested in a Court; that if such Court be created by the Parliament its members must have the tenure of office prescribed by sec. 72 of the Constitution; and that, as the tenure of office of members of the Board did not comply with the requirement of that section, it was beyond the power of the Parliament to confer judicial power on the Board. It followed that the Board of Appeal was not and could not be validly constituted under the Act, and that the High Court could not entertain a case purporting to be stated by the Board pursuant to the provisions of the Act. To meet the position created by this decision Parliament in 1925 passed the *Income Tax Assessment Act* 1925 (No. 28 of 1925). By that Act the name of the Board was changed from "Board of Appeal" to "Board of Review" and secs. 44 and 51 of the earlier Act were repealed. These sections were replaced by provisions which are in the words following:—"44. (1) A Board of Review shall have power to review such decisions of the Commissioner, Assistant Commissioner or Deputy Commissioner as are referred to it by the Commissioner under this Act and, for the purpose of reviewing such decisions, shall have all the powers and functions of the Commissioner in making assessments, determinations and decisions under this Act, and such assessments, determinations and decisions of the Board, and the decisions of the Board upon review, shall, for all purposes (except for the purposes of sub-section 4 of section fifty and sub-section 6 of section fifty-one of this Act) be deemed to be assessments, determinations or decisions of the Commissioner. (2) Notwithstanding anything contained in this Act, a determination made by the Board under section twenty-one of this Act shall not be invalidated by reason of the fact that it is not made within the time prescribed by that section." "51. (1) Where a taxpayer has, in accordance with the

(1) (1925) 35 C.L.R. 422.

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last preceding section, requested the Commissioner to refer a decision to a Board of Review, the Commissioner shall, if the taxpayer's request is accompanied by a deposit of such amount as is prescribed for the particular class of case, refer the decision to the Board not later than thirty days after receipt of the request. (2) A taxpayer shall be limited on the review to the grounds stated in his objection. (3) If the assessment has been reduced by the Commissioner after considering the objection, the reduced assessment shall be the assessment to be dealt with by the Board under the next succeeding sub-section. (4) The Board, on review, shall give a decision and may either confirm the assessment or reduce, increase or vary the assessment. (5) The Board may, if it considers the reference to be frivolous or unreasonable, order the forfeiture of the whole or part of the amount deposited in accordance with sub-section 1 of this section. (6) The Commissioner or a taxpayer may appeal to the High Court from any decision of the Board under this section which, in the opinion of the High Court, involves a question of law."

Having made these alterations in the name and powers of the Board, Parliament, by secs. 18 to 21 of the amending Act, purported to validate the decisions of the body of persons *de facto* acting as a Board of Appeal under the earlier Act by providing that such decisions should be deemed to be and at all times to have been decisions of a Board of Review given in pursuance of the provisions of the later Act, and provided further by sec. 18 that " in any case in which the Commissioner or the taxpayer has instituted, or purported to institute, an appeal to the High Court from the decision of that body of persons, the Commissioner or the taxpayer may appeal to the High Court from that decision (as if it were a decision of a Board of Review) if, in the opinion of the High Court, the decision involves a question of law." By sec. 19 similar provisions were made to apply to cases which had arisen under any Act repealed by the Act of 1922-1924. It is under the provisions of secs. 18 and 19 that these appeals are now brought to this Court.

The first question is whether the amending Act No. 28 of 1925 purports to confer on the Board of Review portion of the judicial power of the Commonwealth. The proper method of approach to this question is, in my opinion, to consider, not whether or to what

extent the obnoxious provisions contained in the earlier Act have been altered, but whether the amending Act itself, properly construed, purports to confer such power. If the words used in the later Act be not ambiguous, its meaning is to be ascertained by interpreting these words, and not by reference to the extent to which its provisions appear to resemble or to depart from the provisions of previous legislation.

Under the Act the Board, for the purpose of reviewing decisions of the Commissioner, is to have all the powers and functions of the Commissioner in making assessments, determinations and decisions under the Act, and such assessments, determinations and decisions of the Board are for all purposes except for the purpose of sub-sec. 4 of sec. 50 and sub-sec. 6 of sec. 51 to be deemed to be assessments, determinations or decisions of the Commissioner. Sub-sec. 6 of sec. 51 has been set out above. Sub-sec. 4 of sec. 50 provides for the reference to the Board at the instance of a taxpayer of decisions of the Commissioner, and alternatively for the objection of a taxpayer to be treated as an appeal to the High Court or to the Supreme Court of a State.

In sec. 51 Parliament has, I think, clearly expressed the intention that, in a controversy between the taxpayer on the one hand and the Commissioner representing the Executive Government on the other, the Board of Review shall be invested with power to determine at the instance of one of the parties to the controversy the respective legal rights and obligations of the parties; conclusively, as to any case in which no question of law is involved, and subject to a right of appeal by either party to the High Court in any case involving a question of law. I find it impossible to regard a tribunal invested with such a power as a mere administrative body or as a mere adjunct to, or agent or instrument of, the Executive Government, exercising portion of the executive power of the Commonwealth. The function of determining finally where no question of law is involved what are the legal rights and obligations *inter se* of the Crown and a subject clearly may be judicial in its nature; and I think it is so when, as in the present case, the Crown and the subject are treated as parties to a *lis* and a right of appeal to a Court of law from the decision of the tribunal is given to either party. It may well be that the

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determination by an officer of the Government or by a Board of the amount of tax payable by the taxpayer, such as an assessment by the Commissioner, may in some cases be treated as an act of administration coming within the ambit of the executive power of the Commonwealth as distinguished from its judicial power. In such cases the officer or Board acts as an agent or instrument of the Executive Government of the Commonwealth on its behalf, and the decision may be regarded as the decision of the Executive. But, where as in this case the decision of the Board as to the legal rights of the Commonwealth is pronounced in a proceeding *inter partes* and may be challenged by the Commonwealth or by one of its officers acting on its behalf, it seems to me that the Board must be taken to be acting as a Judge in a contest between the Commonwealth or its Executive Government on the one hand and the taxpayer on the other, to determine the legal rights and obligations of the parties, who occupy the position of litigants. In these circumstances I think the power exercised by the Board is judicial power.

For these reasons I am of opinion that the decision in the case referred to is in point and that the Board of Review is not legally constituted. It follows that, in my opinion, these appeals are incompetent and should be struck out.

British Imperial Oil Co. v. Federal Commissioner of Taxation.—This is a special case stated by the Supreme Court of Victoria (*Macfarlan* J.) for the opinion of this Court pursuant to sec. 51A of the *Income Tax Assessment Act* 1922-1925. It was argued with the preliminary point in *Munro's Case* before a Full Bench.

The relevant facts may be shortly stated as follows:—On 28th March 1925 notice of assessment to income tax was given to the Company by the Commissioner in respect of the financial year 1924-1925, based on income derived during the year ended 30th June 1924. The assessment purported to be made under sec. 28 of the *Income Tax Assessment Act* 1922-1924, which remained in force until amended by the Act No. 28 of 1925, which became law on 26th September 1925. The Company, being dissatisfied with the assessment, on 4th May 1925 duly lodged objections pursuant to sec. 50 of the Act 1922-1924. On 1st December 1925, after that

Act had been amended by the Act No. 28 of 1925, the Commissioner gave notice to the Company that its objections had been disallowed. The Company then requested the Commissioner, pursuant to sec. 50 (4) of the *Income Tax Assessment Act* 1922-1925, to treat its objection as an appeal and to forward it to the Supreme Court of Victoria, and the Commissioner forwarded the objection accordingly.

On the hearing, in the Supreme Court, of the appeal so constituted, the Company challenged the validity of the assessment on a number of grounds stated in the case, which raised the questions submitted for the opinion of this Court, namely :—(1) Did the said assessment cease to be valid or operative upon the arising of the dissatisfaction of the appellant therewith ? (2) Is the assessment appealed against good in law ?

There are really three questions for consideration, namely :— (a) Was the assessment valid when made ? (b) If so, did it cease to be valid at any time before the passing of the amending Act (No. 28 of 1925) ? (c) If the assessment was originally invalid or became invalid before the passing of the amending Act, was it validated by that Act ?

(a) This question must be dealt with on the Act 1922-1924 as it stood in March 1925. The assessment was made under sec. 28, which, so far as relevant, is in the words following :—"(1) When any business which is carried on in Australia is controlled principally by persons resident outside Australia, and it appears to the Commissioner that the business produces either no taxable income or less than the ordinary taxable income which might be expected to arise from that business, the person carrying on the business in Australia shall be assessable and chargeable with income tax on such percentage of the total receipts (whether cash or credit) of the business, as the Commissioner in his judgment thinks proper. . . . (3) A taxpayer who is dissatisfied with the decision of the Commissioner under this section may require the Commissioner to refer his case to a Board of Appeal, and the Commissioner shall refer the case accordingly."

In the case of *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (1) this Court decided that sub-sec. 3 of sec. 28 was wholly inoperative.

(1) (1925) 35 C.L.R. 422.

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The further discussion of the above question in the present case affords, in my opinion, no ground for departing from that decision. In this view the question as to the validity of an assessment made under sec. 28 turns on the connection or want of connection between sub-sec. 1 and sub-sec. 3 of that section.

If the provisions of sub-sec. 1 are wholly independent of sub-sec. 3, the validity of sub-sec. 1 will not be affected by the invalidity of sub-sec. 3. "But if they" (the provisions of the two enactments) "are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that if all could not be carried into effect, the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them" (per *Shaw* C.J. in *Warren* v. *Charlestown Corporation* (1), cited with approval in *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (2)).

I proceed to consider the provisions of the section. In cases within sec. 28, as in those within secs. 17 and 21 of the Act, the liability to assessment was made to depend on the opinion of the Commissioner as to the existence of certain facts. The question whether the opinion formed by the Commissioner was correct, or whether the grounds on which he formed that opinion were sufficient, would not, apart from the provision for reference of the case to the Board of Appeal, be examinable by any tribunal. His opinion, bona fides being assumed, would be conclusive (*Cornell* v. *Deputy Federal Commissioner of Taxation* (3) ; *Thomson* v. *Federal Commissioner of Taxation* (4)). It was not seriously disputed that, on the reference of the "case" to the Board of Appeal, that Board could review the opinion of the Commissioner or the sufficiency of the grounds on which his opinion was formed. The right to have his case referred to the Board was given to the person affected only in cases coming under secs. 17, 21, 23 and 28 of the Act where the taxpayer's liability to assessment or his claim to a deduction from gross income depended on the opinion of the Commissioner, and

(1) (1854) 2 Gray 84, at p. 99.
(2) (1918) 25 C.L.R., at p. 470.
(3) (1920) 29 C.L.R. 39.
(4) (1923) 33 C.L.R. 73.

was a right of a special kind not available in any other proceedings by way of appeal from a decision of the Commissioner. It is apparent that sub-sec. 3, if valid, would confer on a person assessed under sec. 28 a substantial benefit of which he would be deprived by its elimination. I can find nothing in the words of the enactment inconsistent with the view that sub-sec. 3 should be treated as a proviso to sub-sec. 1, nor anything which indicates that the two provisions were to be construed as wholly independent of each other.

These considerations appear to me to warrant the inference that Parliament intended that the exercise by the Commissioner of the power conferred on him by sec. 28 (1) should be conditional on the right of the person assessed under that provision to have the opinion of the Commissioner and the sufficiency of the grounds on which that opinion was formed reviewed by the Board of Appeal. It follows that, in my opinion, sub-secs. 1 and 3 must be treated as mutually connected with and dependent on each other and that sub-sec. 3 being invalid and inoperative sub-sec. 1 falls with it. It follows also that the assessment in question was not, when it was made, a valid assessment.

(b) The assessment being, in my opinion, originally invalid, this question does not arise.

(c) For the reasons expressed in my opinion in *Munro's Case* I think the provisions of the Act No. 28 of 1925 which constitutes the Board of Review are invalid. It was not contended that these provisions were independent of and severable from the rest of the Act, and, having regard to the provisions of sec. 16, I think it is clear that the validation of assessments is conditional on the existence of the Board of Review. It follows that, in my opinion, the Act so far as it purports to validate the original assessment is invalid, and that question 2 should be answered in the negative.

Federal Commissioner of Taxation v. *Munro* (Merits).—The competency of these appeals having been upheld by the Full Bench, it becomes necessary to deal with them on their merits.

The question at issue in each appeal is whether the respondent is entitled to a deduction from his assessable income of a sum paid by way of interest on a mortgage. The facts, which are not in dispute,

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are as follows, namely :—The respondent at all relevant times was the owner of certain freehold land in Melbourne on which buildings were erected. Parts of these buildings were let to tenants at rentals amounting in all to £2,593, and this sum was included in the assessable income of the respondent. The respondent borrowed from a bank sums amounting to £30,000 or thereabouts, the repayment of which with interest was secured by mortgage of this property. The money so borrowed was applied as to £20,000 in the payment of £1 each on 20,000 shares in a company which the respondent caused to be formed for the purpose of carrying on in New South Wales a business similar to that carried on by the respondent in Melbourne. The balance was advanced by the respondent to the company without interest. Of the 20,000 shares so paid for, 18,000 were by direction of the respondent allotted to his two sons—9,000 to each—as a gift. The remaining 2,000 were held by the respondent. The respondent claimed to deduct the interest paid to the bank during the relevant periods on the amount so borrowed. The Commissioner disallowed his claim, the Board of Appeal reversed the Commissioner's decision and the Commissioner now appeals to this Court.

By sec. 23 (1) (*a*) of the *Income Tax Assessment Act* it is provided that from the total assessable income of a taxpayer there shall be deducted all losses and outgoings including, among other things, interest actually incurred in gaining or producing the assessable income. This section must be read with sec. 25 (*e*), which provides that a deduction shall not in any case be made in respect of money not wholly and exclusively laid out or expended for the production of assessable income. In this provision assessable income must, I think, mean assessable income of the taxpayer claiming the deduction. The prohibition enacted in this section is absolute; and the first question therefore is whether the amounts which the respondent claims the right to deduct were wholly and exclusively laid out or expended for the production of his assessable income. It is quite clear that the money borrowed from the bank was not so laid out or expended, for nine-tenths of the amount was applied directly or indirectly for the benefit of his two sons—directly as to the £18,000 paid for the shares given to them, and indirectly as to the advances made to the company, in which they held nine-tenths of

the shares. The obligation to pay interest arose out of the loan by the bank, and might have been enforced against the respondent independently of the mortgage given by him. If no mortgage had been given to secure the payment of principal and interest to the bank, the liability of the respondent would have been no less, but it was not suggested at the Bar that in that case he would have been entitled to any deduction in respect of interest paid by him. It is said, however, that, because the respondent gave a mortgage over his rent-producing property to secure payment of principal and interest to the bank, the payment of interest was necessary in order to enable him to receive the rents of the property and the amount paid was therefore wholly expended for the production of assessable income. Indeed, it was contended that, whenever money was borrowed by a taxpayer on the security of a rent-producing property, the interest paid under the mortgage should be deducted from his assessable income, irrespective of the purpose to which or the manner in which the money borrowed was applied.

In this case the assessable income of the taxpayer was in no way referable to the transaction with the bank out of which the liability to pay interest arose, and the loan by the Bank was in no way instrumental in or conducive to the production of the assessable income or that part of it which consisted of the rents of the freehold property. The respondent was, before the mortgage was given, entitled to the whole of these rents, and he did not gain them nor were they produced in consequence of the payment of interest. The interest was paid, not for the purpose of gaining or producing assessable income of the taxpayer, but for the purpose of satisfying *pro tanto* a debt which the taxpayer had incurred with a view, not to the production of his assessable income, but to the production of income by the company for the benefit of its shareholders. The debt having been incurred for a purpose wholly unconnected with the production of assessable income of the respondent, I think it impossible to say that the interest paid on the amount of the debt was money wholly and exclusively laid out or expended for the production of his assessable income.

For these reasons I am of opinion that the appeals should be allowed and the decision of the Commissioner restored.

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ISAACS J. *Federal Commissioner of Taxation v. Munro* (Law Points).—This case, so important in every way, comes to us under secs. 18 and 19 of the amending Act of 1925, No. 28. It has been twice argued, and the second argument has confirmed the opinion I had formed after the first. The material facts are that the Commissioner assessed the appellant for the financial years 1921-1922 and 1922-1923. An objection was lodged against the disallowance of some bank interest paid by the taxpayer. The taxpayer in 1924 asked that the matter should be referred to the Board of Appeal. In December 1924 the Board decided in favour of the taxpayer, and in February 1925 the Commissioner gave notice of appeal to this Court. Later in that month this Court heard an appeal in the case of *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (1), and held that under the law as it then stood the Board was not validly constituted because by the terms of the then existing statute "judicial power" in the strict constitutional sense had in fact been conferred on the Board contrary to the judicature provisions of the Constitution. The Court went carefully through the statutory provisions and stated its reasons categorically. In September 1925 the Commonwealth Parliament drastically altered the Act so as to conform to the law as explained in the judgments, and created a new Board—a Board of Review—on a totally different basis. Provision was made for dealing with future objections, and other provisions were introduced for dealing with past objections. Secs. 18 and 19 are the appropriate sections for the present case; and under these this appeal comes on to be heard.

The respondent contests the merits, but also on several grounds objects to the Court entertaining the appeal at all, and raises arguments that, even if the Court can entertain the appeal, it ought to be dismissed irrespective of the merits, and simply because the legislative provisions of the Act of 1925 relating to the Board of Review are invalid. This Full Bench hearing is concerned, not with the merits, but only with the legal objections anterior to the consideration of the merits. The legal objections stated in logical order are: (1) the retrospective adoption of decisions of the former *de facto* Board of Appeal is invalid; (2) the present Board of Review is

(1) (1925) 35 C.L.R. 422.

invalidly constituted because, while not being created a Court as required by Chapter III. of the Constitution, it is given judicial power in the strict constitutional sense; (3) the Act of 1925, assuming to constitute the new Board of Review, fails to have any relevant legal operation by reason of sec. 55 of the Constitution; (4) sec. 55 by its second limb annuls sec. 28 of the Principal Act. These objections, which are quite distinct, have been supported by contentions of very varied character, each of which represents a highly important aspect of constitutional law.

1. *Secs.* 18 *and* 19 *of the Act of* 1925.—These provisions are first attacked radically as being an attempt to validate retrospectively what could not have been authorized prospectively by the Parliament. I entirely accede to the principle invoked, but its application is, in my opinion, unwarranted. It is said that, since this Court in the *British Imperial Oil Co.'s Case* (1) declared the " decisions " in fact of the old Board of Appeal unauthorized in law and therefore void, even though prospectively permitted by Parliament they cannot be taken up retrospectively and simply validated by Parliament. If the assumed premises were true the conclusion would be sound. But the premises are not true. The new legislation does not recognize the old Board of Appeal at all except to identify the individual persons who assumed to compose it. The new legislation does not recognize the old decisions as those of the Board but as those of the individual persons referred to and identified, and those decisions were facts. The new legislation does not attempt to give to those *de facto* decisions any such status as they purported to have under the former legislation, that is, as judicial determinations; it does attempt to adopt those decisions held *not* to be judicial decisions as administrative *facta* on the same footing as future decisions of the new Board of Review. Unless the new Board of Review is, for the reason stated in the second objection, to be regarded as incompetently created, *Parliament could have antecedently authorized what it has retrospectively adopted.* The scheme of retrospective adoption includes the retrospective creation of the Board of Review itself by which it is deemed to have been created in October 1922. The individual decisions—failing of effect as decisions of the old Board

(1) (1925) 35 C.L.R. 422.

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of Appeal—are not revived as judicial decisions, but are declared to be as valid and effective as if given by the new Board of Review, which is *deemed* to have existed at the date of the decisions. Unless the power of the Legislature to make that retrospective declaration is denied, this Court must place those decisions on the same footing as they would be on if the now existing Board of Review had then pronounced them. The first objection, in my opinion, fails, and we are driven to consider the second.

2. *Board of Review.*—One preliminary circumstance may be at once referred to. It was contended for the respondent that the decision in the *British Imperial Oil Co.'s Case* (1) supported the similar objection to the present Board of Review. In view of that contention permission was given to reopen, if necessary, the reasoning in that case. Since the statutory provisions upon which it was founded have—subject to the third objection—been repealed and replaced by markedly different provisions, it is evident that reconsideration of the decision must be limited to the principles of law enunciated. If, on the other hand, the third objection be sustained, the present appeal must fall in any event. No principle enunciated in that case, however, was challenged at the Bar. The argument of the respondent naturally challenged nothing of that decision, because it was made a starting-point for the second objection. It challenged some of the opinions expressed. A suggestion, however, was made that the decision was wrong because the appellate power of this Court is not confined to appellate power within the meaning of sec. 73 of the Constitution but may be extended by Parliament to revision of administrative decisions. The suggestion is contrary to the expressed views of this Court from the very first case decided, namely, in 1903, *Dalgarno* v. *Hannah* (2), to the *British Imperial Oil Co.'s Case*, decided last year. It is also contrary to principle, because, as *Story* says in his work on the *Constitution* : " In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies that the subject matter has been already instituted in and acted upon by some other *Court*, whose judgment or proceedings are to be revised " (par. 1761). I have no hesitation in adhering

(1) (1925) 35 C.L.R. 422.

(2) (1903) 1 C.L.R. 1, at p. 10.

to the decision referred to, and for the reasons there given. But, that decision standing, what after all is its effect upon the present case ? The mere fact that it interprets a differently worded statute excludes its relevancy apart from enunciation or affirmation of some principle. It has no more relevancy than the interpretation of one will has to that of a different will. But as a matter of contrast it affords a powerful illustration. The difference in point of status and nature of function between the new Board of Review and the original Board of Appeal is the difference between daylight and dark. When Parliament has shown so unmistakably its resolve to steer clear of the judicial rocks plainly charted in the earlier case, it would be a serious matter to impute an intention which would wreck the legislation and confuse the finances. In the former legislation the Board of Appeal was linked up in character with the High Court and the Supreme Court of the State, and an appeal on law points was given to this Court in its appellate jurisdiction. That was an unmistakable and an inseparable indication that the Board of Appeal was intended by Parliament to exercise "judicial power." Where that legislative intention appears in addition to a tribunal so constituted, it must fail by reason of the constitutional provisions contained in sec. 71 of Chapter III. of the Constitution. And it matters not how that intention appears, so long as on proper methods of construction it does appear. It may appear, for instance, where the new tribunal is created expressly as a "Court" and the functions assigned are appropriate to judicial action. That is exemplified by *Alexander's Case* (1). And as to the importance of the nature of the tribunal see *National Telephone Co.* v. *Postmaster-General* (2). Or it may appear simply from the nature of the functions assigned, where they are appropriate *exclusively* to judicial action, as punishment for crime or trial of actions for breach of contract or for wrongs. But there are many functions which are either inconsistent with strict judicial action, as the arbitral functions in *Alexander's Case*, or are consistent with either strict judicial or executive action. If inconsistent with judicial action, the question is at once answered. If consistent with either strictly judicial or executive action, the matter must be examined further. In a sense the function may

(1) (1918) 25 C.L.R. 434.

(2) (1913) 2 K.B. 614; (1913) A.C. 546.

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involve so-called judicial conduct in a wider sense than the dispensing of the King's justice as understood in the law. It may be merely the incidental or ancillary determination of circumstances as a *factum* for the operation of the legislative will. The dispensing of royal justice by means of the King's judicial power is in itself a primary function ; the ascertainment or determination in a judicial manner of facts, whether controverted or not, for the purpose of carrying out executive functions in a just way is a secondary or incidental function attached to and taking its dominant character from the main purpose. The very same process may thus, in some instances, be either judicial or executive. A right of appeal from the decision of a Permanent Secretary to the Minister, whose direction is, after hearing the parties concerned, to govern their rights, is primarily executive. The same right of appeal to a Court is primarily judicial. The whole relevant legislation must, in such a case, be looked to in order to pronounce upon the question as to which category the particular function belongs to. If, for instance, the Legislature could validly go on to give the tribunal jurisdiction to enforce the decision by execution, the function would be judicial, since the concept of judicial power includes enforcement. If, however, the Legislature could not validly add that jurisdiction, then, in the absence of other controlling expressions—as in the *British Imperial Oil Co.'s Case* (1)—one would say the function assigned was not judicial. The application of these considerations to the present case leaves me in no doubt whatever as to the character of the function assigned to the Board of Review. The only judicial attribute here is that controverted matters of fact and discretion are to be decided by the Board if the taxpayer is dissatisfied with the Commissioner's decision regarding the assessment and, unless some misconstruction of the law takes place, the Board's decision stands as the assessment. All questions of law are for the Court. The power and function of finally determining matters of fact and even of discretion are not solely indicative of judicial action. That is an attribute common to administrative bodies, to subordinate bodies that are adjuncts to legislation, and to judicial bodies. (See *Sir William Harrison Moore's Commonwealth of Australia*, 2nd ed.,

(1) (1925) 35 C.L.R. 422.

at pp. 305-306.) The character of the function often takes its colour largely from the primary character of the functionary, and depends also on how the decision is made binding and how enforced. Government could not be carried on without some administrative power of finally determining disputed facts. This is becoming every day more manifest and pressing. As was said by Viscount *Haldane* in *Everett* v. *Griffiths* (1), "the tendency of modern legislation has recently been to entrust to many who are prima facie only administrative officers, functions which have some judicial attributes at all events, although they remain primarily administrators." His Lordship then refers to the cases of *Board of Education* v. *Rice* (2) and *Local Government Board* v. *Arlidge* (3), and speaks of them as "administrative awards" attended with "quasi-judicial powers." The word "appeal" is appropriately used even as to executive functions (see *Arlidge's Case*, per Lord *Haldane* L.C. (4), per Lord *Parmoor* (5), and very particularly per Lord *Moulton* (6)). Everyone knows that the term "quasi-judicial" means not strictly judicial but analogous to judicial. The case of *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montreal* (7) shows this very clearly both in its own language and in the language quoted. In *Fisher* v. *Keane* (8) *Jessel* M.R. referred to the committee of a club as "a judicial, or quasi-judicial tribunal." I am quite unable to understand why Parliament, without in the least trenching upon the strictly judicial domain reserved for the Judicature, cannot entrust successive administrative functionaries to consider and review assessments, making the final decision the governing *factum* fixing the taxpayer's liability. In doing that, what is there to prevent Parliament from enabling the Commissioner to contest the challenge of his initial accuracy? For instance, if, instead of the Court, the Treasurer were made the ultimate functionary to settle the accuracy of the Board's assessments in case either the Commissioner or the taxpayer desired further revision and appeared to explain why, how could it be said with any show of reason that the Board's functions were of that strictly

(1) (1921) 1 A.C. 631, at p. 659.
(2) (1911) A.C. 179.
(3) (1915) A.C. 120.
(4) (1915) A.C., at p. 132.
(5) (1915) A.C., at p. 144.
(6) (1915) A.C., at p. 146.
(7) (1906) A.C. 535, at pp. 539, 540.
(8) (1878) 11 Ch. D. 353, at p. 360.

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constitutional judicial character that is reserved for the Judicature. It would not alter the nature of the Treasurer's functions if Parliament expressly said the Commissioner should be heard by the Treasurer. The function would be departmental and administrative. If that be so, it surely cannot alter the nature of the Board's duties if, on the assumption that the Board has violated the statute, the Court may be asked by either the Commissioner or the taxpayer to correct the error.

The decisions of the Board of Review may very appropriately be designated, in Lord *Haldane's* words, "administrative awards," but they are by no means of the character of decisions of the Judicature of the Commonwealth. I shall presently indicate how essentially in this respect the position of this Board differs from that of the former Board. In the meantime I would say, speaking with considerable experience in each of the three departments of government, that, if a legislative provision of the present nature be forbidden, then a very vast and at present growing page of necessary constitutional means by which Parliament may in its discretion meet, and is at present accustomed to meet, the requirements of a progressive people, must, in my opinion, be considered as substantially obliterated so far as the Commonwealth is concerned. Administration must be hampered, and either injustice suffered or litigation fostered. The Constitution, it is true, has broadly and, to a certain extent, imperatively separated the three great branches of government, and has assigned to each, by its own authority, the appropriate organ. But the Constitution is for the advancement of representative government, and contains no word to alter the fundamental features of that institution.

Partly repeating, for emphasis, some previous observations, I would say that some matters so clearly and distinctively appertain to one branch of government as to be incapable of exercise by another. An appropriation of public money, a trial for murder, and the appointment of a Federal Judge are instances. Other matters may be subject to no *a priori* exclusive delimitation, but may be capable of assignment by Parliament in its discretion to more than one branch of government. Rules of evidence, the determination of the validity of parliamentary elections, or claims

to register trade marks would be instances of this class. The latter class is capable of being viewed in different aspects, that is, as incidental to legislation, or to administration, or to judicial action, according to circumstances. Deny that proposition, and you seriously affect the recognized working of representative government. Admit it, and the provision now under consideration is fully sustained.

I will mention a few instances of tribunals set up for administrative purposes, but all of them empowered to exercise the functions of deciding between contestants questions of fact and discretion and of doing so with the effect in some way of binding the rights of one or more of the contestants. The *Trade Marks Act* (see secs. 34, 42, 43 and 44), for example, empowers the Registrar, and on appeal from him the Law Officer, to decide very important controverted facts and law. An appeal is given to this Court from either Registrar or Law Officer. If the legislation as to the Board of Review conflicts with the Constitution, then *a fortiori* do the trade mark provisions referred to. The *Patents Act* stands in the same position. The *Commonwealth Public Service Act* 1922 provides for a Board of Inquiry and Appeal Board which inquires into alleged offences, summons any person to attend, takes evidence on oath, requires production of documents, and determines the rights and obligations of officers. Sec. 50 as amended (sec. 15 of Act No. 46 of 1924) allows an appeal to the Board from the Permanent Head on questions of transfer or promotion. The Board hears "the appellant" and "determines the appeal." Statutory rights are thereby definitely affected. Again, take the Board of Directors and the Appeal Board of three members under sec. 16B of the *Commonwealth Bank Act* 1911-1924. Where an officer of the bank is affected in his employment by some bank authority he may appeal to the board of directors, which refers the matter to an appeal board. The latter reports to the board of directors, which "shall determine the appeal and notify the appellant of its determination, which shall be final and conclusive."

What is the discrimen which can nullify the Board of Review and uphold all the rest? I can find none, and can find no reason for invalidation in any case. This case has been twice argued, and

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learned counsel has, with becoming frankness, indicated a possible further appeal. Therefore I shall state somewhat more explicitly the reasons leading to my opinion. It is always a serious and responsible duty to declare invalid, regardless of consequences, what the national Parliament, representing the whole people of Australia, has considered necessary or desirable for the public welfare. The Court charged with the guardianship of the fundamental law of the Constitution may find that duty inescapable. Approaching the challenged legislation with a mind judicially clear of any doubt as to its propriety or expediency—as we must, in order that we may not ourselves transgress the Constitution or obscure the issue before us—the question is: Has Parliament, on the true construction of the enactment, misunderstood and gone beyond its constitutional powers? It is a received canon of judicial construction to apply in cases of this kind with more than ordinary anxiety the maxim *Ut res magis valeat quam pereat.* Nullification of enactments and confusion of public business are not lightly to be introduced. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will. Construction of an enactment is ascertaining the intention of the legislature from the words it has used in the circumstances, on the occasion and in the collocation it has used them. There is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds. If the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail. That is the principle upon which the Privy Council acted in *Macleod* v. *Attorney-General for New South Wales* (1). It is the principle which the Supreme Court of the United States has applied, in an unbroken line of decisions, from *Marshall* C.J. to the present day (see *Adkins* v. *Children's Hospital* (2)). It is the rule of this Court (see, for instance, per *Griffith* C.J. in *Osborne* v. *Commonwealth* (3)). These considerations I proceed to apply to the present case.

(1) (1891) A.C. 455.

(2) (1923) 261 U.S. 525, at p. 544.

(3) (1911) 12 C.L.R., at p. 337.

In using the word " appeal " in the collocation in which it is found in secs. 18 and 19 of the Act of 1925, Parliament did not mean to create a new appellate power of this Court. That would have been contrary to the expressed views of this Court on that point from the very first case decided in 1903, *Dalgarno* v. *Hannah* (1), to the *British Imperial Oil Co.'s Case* (2), decided last year. If, as was found in the last-mentioned case, the express language of the Legislature, whether employed by inadvertence or otherwise, leaves no other interpretation possible, the Court must accept it as governing the intention. But here the Legislature has sedulously and in detail corrected that very language and, by the omission of appellate jurisdiction in relation to the Board and by the contradistinctive use of the term " appellate jurisdiction " in another connection, has shown that it did not mean appellate jurisdiction when giving what is called an " appeal " from the Board. The " appeal " in secs. 12, 18 and 19 of the amending Act is simply the creation of original jurisdiction under sec. 76 of the Constitution. It appears to me impossible to construe the word " appeal " in secs. 12, 18 and 19 of the amending Act otherwise than as giving merely the right of applying to this Court to exercise its ordinary judicial power in original jurisdiction. The effect of the contrary view of the word " appeal," if applied to other legislation, such as the *Trade Marks Act*, the *Patents Act*, and other Acts, would be disastrous.

There is some language in amended sec. 51 which perhaps calls for some attention. I refer to sub-sec. 6, which says: " The Commissioner or a taxpayer may appeal to the High Court from any decision of the Board under this section which, in the opinion of the High Court, involves a question of law." That is to be considered with the concluding words of sub-sec. 1 of sec. 44 as amended. Those concluding words except from the legal assimilation of the Board's decisions with the Commissioner's decisions the purposes of sub-sec. 4 of sec. 50 and sub-sec. 6 of sec. 51. The latter sub-section, of course, means that the Board's decision, unlike that of the Commissioner, is not necessarily to be accepted by the Crown as correct. The Commissioner may on behalf of the Crown contest it before this Court if, and only if, it is thought to

(1) (1903) 1 C.L.R., at p. 10.

(2) (1925) 35 C.L.R. 422.

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be wrong owing to an error in law. But when sub-sec. 6 of sec. 51 is read, not merely with the rest of that section but with the whole of Part V., as it must be, and particularly when its history is considered, the substance of the legislation, in my opinion, frees the matter from any difficulty. Once we conclude that the word "appeal" in sub-sec. 6 of sec. 51 (and the same word in secs. 18 and 19 of the amending Act) has reference to original jurisdiction, *it follows necessarily that the Board was not intended by Parliament to exercise judicial power at all in the constitutional sense.* In this vital respect the present legislation differs *toto cælo* from the prior enactment under which the *British Imperial Oil Co.'s Case* (1) was decided. Apart from that distinctive difference, a detailed examination of the amending Act indicates the careful and elaborate way in which Parliament set itself to alter the existing law so as to conform to the law as laid down by the Court in the *British Imperial Oil Co.'s Case*, while establishing a Board of Review as an aid to the fair administration of the Act. There can be no doubt, especially since the case of *In re Viscountess Rhondda's Claim* (2), that a comparison of the amending Act with the Act it amended is not only permissible, but necessary, because the whole argument for invalidity rests on implied intention to adhere to or alter the prior law. When that comparison is made, the general intention is apparent to transform the old Board of Appeal, declared by the Court to have a judicial character *de facto*, into a Board of Review having a true administrative character and affording, as I have said, a practical means of reconsidering business matters without the intricacies, delay and expense of legal proceedings. The Courts were reserved for matters involving legal questions.

To show how completely the two Boards differ in character the principal amendments made *seriatim* must be followed:—(a) Sec. 17 of the main Act was altered by leaving so far as that section is concerned the Commissioner's decision absolutely final. This was done by eliminating all reference to a Board. (b) Similarly with regard to secs. 21, 23 and 28. (c) In sec. 41 the title of the Board was altered from "Board of Appeal" to "Board of Review." (d) Sec. 44, which previously expressly applied sections creating

(1) (1925) 35 C.L.R. 422. (2) (1922) 2 A.C. 339.

judicial powers to the Board, is absolutely transformed. Instead of assimilating the Board to the Court, as in the old sec. 44, the Board in the new sec. 44 is assimilated to the Commissioner. Instead of the Board being given the powers and functions of the Court, it is given "the powers and functions of the Commissioner in making assessments, determinations and decisions under this Act." Those are the only powers and functions conferred upon the Board for the purposes of decision. Other powers of formulation *after* decisions are given, but these are incidental only. (e) Sec. 44 then takes up the "decisions" of the Board and says they are for all purposes (with certain exceptions) to be deemed those "of the Commissioner." (f) The first exception is patently immaterial here. It is merely to prevent the taxpayer having a double choice instead of an alternative choice of tribunal from the Commissioner. (g) The second exception, when carefully examined, is really to negative the notion of the Board being judicial. It allows an appeal to the Court from any decision which in the opinion of the Court is a question of law. That is to say, the Crown is bound by all opinions of the Board on pure matters of fact—that is, on true administration of the law—but as to law the Court, and not the Board, is to determine. The appeal being given to the Court in its original jurisdiction only—which is manifest when sec. 50 (4) (*b*) and sec. 51A (2) and (10) are compared —it follows necessarily that the Board's decision is not intended to be an exercise of the judicial power. The fact that the Commissioner may appeal as well as the taxpayer only indicates that the Crown as well as the subject may invoke the Court to correct a misconstruction of the law, which would, of course, affect not merely that taxpayer but all taxpayers in a similar position. (h) The Board's decision, when given, may, by sec. 51 (4), be formalized by confirming, reducing, increasing or varying the assessment. This is form only. (i) By the next sub-section it may order the forfeiture of the deposit if it thinks the reference frivolous or unreasonable. Administrative "orders" are numerous, and, in this instance, the exercise of the power rests, not on law, but on opinion. In any event the sub-section is quite subsidiary. This series of amendments, not only leaves the case of the *British Imperial Oil Co.* (1) no precedent

(1) (1925) 35 C.L.R. 422.

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for nullifying the present legislation, but makes that case, if relevant at all, a very strong authority for differentiating between the two enactments and for supporting the amending Act.

3. *Sec. 55 of the Constitution.*—Up to the present point the case has been treated as if the new Act of 1925 were unaffected by the special provisions of sec. 55 of the Constitution. For instant purposes that means that sec. 7, for example, of the Act of 1925, repealing sub-sec. 3 of sec. 28 of the earlier Act, and secs. 9 and 10, altering the nature of the Board, are in law part of the statute, their effect and their operation being determined by other considerations. But it is urged that these sections—among others—are by force of the first limb of sec. 55 of the Constitution to be regarded as of no effect. It is argued that sec. 22 of the Act of 1925 is a law "imposing taxation" and therefore the sections referred to fall. But sec. 22 is merely an amendment of the former Assessment Act and deals with official formalities. It does not purport to "impose taxation"; it assumes the existence of a law imposing taxation, it assumes official action under an assessment law relating to such taxation, and then it prescribes the nature of a sufficient official act for the purpose of recovering the tax already imposed and ascertained by assessment. The mere fact that a condition of liability to *enforcement* of the tax is relaxed is not equivalent to a fresh imposition of the tax. There is no reason for applying the first limb of sec. 55. Sec. 7 of the Act of 1925 validly repeals retrospectively sub-sec. 3 of sec. 28 of the Principal Act.

As to the second limb of sec. 55 of the Constitution, represented in the fourth objection, a devastating effect is sought to be attached to sec. 28 of the Assessment Act. It is said that the tax there sought to be "imposed" is not an "income tax" but some other tax, namely, a tax on an estimated percentage of gross receipts. That is said to be another "subject of taxation" and to be contrary to the peremptory requirement of the second paragraph of sec. 55. If that section be not a "law imposing taxation" the contention falls. But if the section be a "law imposing taxation," the rest of the Assessment Act falls by virtue of the first limb of sec. 55. And then, by virtue of the second limb, sec. 28 acting on the incorporation into the Taxing Act of the whole of the Assessment Act, the Taxing

Act itself wholly disappears because sec. 55 is a limitation of the general power of legislation. The answer to all this appears to me to be plain. First, sec. 28 is not a "law imposing taxation." It is part of an Assessment Act, and it creates a special measure of "taxable income" to meet the special circumstances of a case offering facilities for evasion and not justly met by the ordinary measure of taxable income generally applying to Australian incomes. Sec. 2 of the relevant Taxing Acts incorporates the relevant Assessment Acts. The incorporation in each case includes sec. 28. Therefore, when, as is the case, the Taxing Act imposes the income tax by fixing rates upon what it calls "taxable income," one has to read the Taxing Act itself to see what is meant by "taxable income." There is in that Act no definition of that term other than that which can be found in the Assessment Acts incorporated. It is true that sec. 55 of the Constitution by its first branch eliminates from the Taxing Act all of the Assessment Acts as incorporated, except such parts as deal with the "imposition" of the taxation, leaving them to operate independently as Assessment Acts. But every part of the Assessment Act establishing what is "taxable income" within the meaning of the Taxing Act remains incorporated, because every such part is essential to understand the term "taxable income."

I had, thus far, stated shortly and succinctly the effect of the Constitution on the relevant statutory enactments and, until the argument in the later case of *Federal Commissioner of Taxation* v. *Hipsley* (1), I thought that statement sufficient. But in view of the further argument in that case, it is, I think, desirable to treat the matter once and for all in greater detail.

This branch of the case affects one of the vital compromises of the Constitution, whereby an adjustment was made so as to permit of responsible government as understood in British communities—that is, the responsibility of the Ministers of the Crown to the representatives of the nation considered numerically—and at the same time to guard the Senate from financial coercion in its representation of the nation grouped in States. I confess I am greatly concerned lest what the pen has written the axe may destroy. If the reasoning prevailed upon which, in reliance upon the second

(1) *Post*, 219.

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limb of sec. 55, the constitutional attack upon the legislation has been made, it would leave to the chance majority in Parliament for the time being to determine, by the mere form in which taxation Bills were framed, whether the constitutional powers and privileges of either House should be exercised or not. If such measures were introduced in one form, the Senate could not amend a line of any provision relating to the assessment, collection or enforcement of the tax; and, if in another form, it could amend every provision relating to the imposition of the tax. So far as taxation Bills are concerned, sec. 53 and the first limb of sec. 55 would be dead letters. The Constitution would become the plaything of political parties. Only one thing could avoid that result, that is, the entire exclusion of the Senate in the opinion of this Court from amendment even of a taxation machinery Bill. If, as seems to me unquestionable, no sensible distinction can be drawn between a Bill "*imposing* taxation" and a Bill "dealing with the *imposition* of taxation," then, if machinery for collection is incidental to, that is, incidentally included in, "imposition," it necessarily follows that the Senate cannot, consistently with sec. 53, amend an ordinary Assessment Bill at all. If this were held by the Court, and it is perhaps the only logical conclusion should the opposing contention be upheld, then one of two results would inevitably follow: either the Senate would, conformably to that opinion, be shorn of rights it has always by common consent enjoyed, or else both Houses of Parliament would with impunity constantly disregard the opinion of this Court and in the most practical manner declare its incorrectness. In either event the dominant intention of the Constitution in this respect would be defeated. It was that a political struggle should never take place; that a surrender could never take place; that the Senate should never be in real danger of surrender; and that, if coercion were pressed so far as to be politically successful, it should not be legally successful, because this Court under sec. 55 would be the standing security for the maintenance of the rights of the Senate.

The theory that is opposed to the view I have expressed, apart from the objection that in fact two subjects of taxation are dealt with, rests on some or all of three propositions: (1) that no enactment is a "law" imposing taxation within the meaning of

the Constitution unless it directly or by reference completely provides for subject matter, rates and persons liable; (2) that a law still deals only with the "imposition" of taxation if it also enacts provisions regulating the assessment, levy, collection and enforcement of the tax, with penalties, including creation of tribunals and the investment of judicial power; and (3) that if an Act imposing taxation incorporates an existing Assessment Act, the independent Assessment Act thereby itself becomes a law imposing taxation.

Before indicating how utterly opposed to these propositions were the opinions of former members of this Court, it is advisable to examine the position independently. It is, of course, familiar to us all that Money Bills were a pregnant source of controversy in colonial Parliaments, and that to a greater or less degree the relations of the two Chambers in each colony were in this respect moulded on British precedent. Indeed, British precedent and terminology lie at the root of the matter, the constitutional compromise being the agreed modification of the Imperial system. That system, for present purposes, begins with the *Bill of Rights*, which declares: "That *levying* money for or to the use of the Crown, by pretence of prerogative, without *grant* of Parliament, for longer time, or in other *manner* than the same is or shall be granted, is illegal." We have there the main divisions of the subject of legal taxation. "Levying" taxation, that is, *collection*, is an executive act, and it cannot be supported by the law of the prerogative. The "grant," that is, the *imposition* of the tax by Parliament, is essential. The "period" is necessarily part of the grant. The "manner," that is, the machinery, such as the assessment, &c., must be prescribed by Parliament. In these days, the divisions so marked out are spoken of as "imposition" or "imposing," and "assessment and collection." *Bowles* v. *Bank of England* (1) is a most convenient place to find all these phrases of the parliamentary and executive processes of obtaining taxes from the subject mentioned and differentiated. Almost every page from p. 70 to p. 82, and the judgment of *Parker* J., *passim*, will attest this. It will there be seen that the words "imposition" and "imposing" mean the

(1) (1913) 1 Ch. 57.

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same thing, and that both mean the *grant*; further, that both are distinct from the management, assessment, collection and control of the tax.

It is common knowledge that up to 1860 contests arose between the Lords and the Commons as to their respective rights and privileges regarding Money Bills. In that year the House of Commons passed resolutions setting forth its privileges with respect to taxation, and give practical effect to them in the forms of the financial Bills it passed. *Anson* (*Law and Custom of the Constitution*, 5th ed., vol. I., pp. 283-284) says: "There can be no doubt that the principle of these resolutions expanded, and that the Commons came to regard as a breach of privilege not merely the *imposition* by the Lords of any charge by ways of rates or taxes, but any *dealing with the regulation or administration* of such a charge." (The italics are mine.) Not merely does the passage recognize the inherent distinction between "imposition" and collection of the tax, but the words "dealing with" are illustrative of their meaning in connection with any specific branch of taxation. To "deal with" a specific branch of taxation means, according to the quotation, directly to regulate that branch, and not merely to assist it indirectly by directly regulating some other branch.

That being the British system and terminology, secs. 53 and 55 of the Constitution can readily be understood. Confining myself to taxation only, sec. 53—which is for parliamentary guidance only—declares (1) that proposed laws imposing taxation shall not originate in the Senate; (2) that "the Senate may not amend proposed laws imposing taxation"; or (3) "amend any proposed law so as to increase any proposed charge or burden on the people." Passing by the provision for requests, the section declares that, except as therein provided, the Senate is to have equal powers of legislation with the House of Representatives. Now, if, as was argued, in accordance with the first proposition formulated, no law is a "law imposing taxation" unless complete as to rate, subject matter and every person to be reached, and so that an instant certain obligation lay on identifiable persons, it is plain that a Bill could lawfully and in full conformity with the Constitution be originated in the Senate, declaring that there shall be a land tax.

an income tax, or any other tax at a stated rate to be paid by all such persons as might be declared by a later Act. Or, if such a Bill were originated in the House of Representatives, it could be amended in the Senate. Such a construction would, as is apparent, entirely annul the first three provisions quoted from sec. 53 and subvert the constitutional arrangement to the prejudice of the House of Representatives. It ought not, in my opinion, to receive the sanction of this Court. The expression law or proposed law "imposing taxation" has reference, not to the completeness or incompleteness of its provisions, but to the character or category which is properly applicable to it. It belongs to the category of laws by which a tax is "imposed." It may be in an absolutely complete form, or it may be in a form which needs some further provision or some further action to make it complete or operative. But, if it is essentially a measure appertaining to the classification of those "imposing taxation," then, even if it merely takes the first step as declaring that there shall be a poll tax leviable on such persons and at such rates as may be declared by some future Act, it is for the purposes of the Constitution a measure "imposing taxation." If it went on to name the rate, but left the persons on whom the tax should fall to be thereafter determined, the same result would follow. The proposition leads, indeed, to absurdity. If the words "law imposing taxation" mean a law which, as it stands, completely and presently "*imposes* taxation," though it may be from some future date, then the phrase "proposed law imposing taxation" means a proposed law which, as it stands, completely and presently *imposes* taxation. That would be nonsense, but inescapable nonsense. It shows that the words "imposing taxation" are descriptive of the nature or character of the Bill or the law, and indicate the category it occupies in political practice. Any other construction leads, as is plain, not merely to a clear path for evasion of the Constitution, but to a misunderstanding of the history of the subject. We have only to imagine a Money Bill in England or in a State to enact that a tax of £1 a head should be henceforth imposed on horses, payable by such persons and with such exemptions as should thereafter be enacted. Could it be doubted that the Legislative Assembly of a State would regard that

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as unalterable by the Legislative Council? The first proposition then, if maintained, strikes at the House of Representatives.

Passing then to the second proposition, that, if maintained, would equally emasculate the Senate's co-ordinate power over taxation machinery Bills. We have only, in accordance with that proposition, to imagine a complete taxation measure combining the Taxing Act and the Assessment Act. If the proposition be true, then, as it assumes, the Bill is "a proposed law imposing taxation," and it is throughout unamendable by the Senate. It may include, as the Income Tax Act would, on this assumption, include, provisions for Boards of Review, their remuneration and duties, provisions enabling this Court to make rules, provisions for criminal consequences, provisions for validating former statutory rules; and yet, because included in a Bill which *inter alia* does impose taxation, the Senate is entirely precluded from amending a letter of the whole measure. That, in my opinion, is a radical error and cuts away a right which, on the well-understood meaning of parliamentary terms, is conserved to the Senate by the words of the Constitution.

I do not think the fallacy can be better exposed than in the words of *Griffith* C.J. in *Osborne's Case* (1). It was there the opinion of four members of the Court (*Griffith* C.J., *Barton* J., *O'Connor* J. and myself) that the *Land Tax Assessment Act* 1910 (No. 22) was not an Act imposing taxation within the meaning of sec. 55 of the Constitution, although the *Land Tax Act* itself (No. 21) incorporated in itself the provisions of Act No. 22. The argument for invalidity of sec. 39 of the Act No. 22 of 1910—on which the liability of the appellant depended—was, as the Chief Justice pointed out, of a twofold nature. First, it was said (2) that the Acts, that is, both No. 21 of 1910 and No. 22 of 1910, dealt with more than one subject of taxation, and were, therefore, wholly invalid. Then there was what the learned Chief Justice called "a subsidiary argument whether the *Land Tax Assessment Act* is a law imposing taxation within the meaning of sec. 55." He said: "In the view I take of another branch of the case it is not necessary to express a concluded opinion on this point, but I think it right to say a few words about it." Now, before quoting the "words," let us remember that the

(1) (1911) 12 C.L.R. 321.

(2) (1911) 12 C.L.R., at p. 335.

Taxing Act (No. 21 of 1910) had incorporated the provisions of the Assessment Act (No. 22 of 1910). Bearing that fact in mind, we can appreciate the words which follow : " Some confusion was introduced into the argument, I think, by the tacit assumption that a *law dealing with taxation* is necessarily a *law imposing taxation*." I stop there a moment because it is necessary in order to draw attention to the precision of the language used. " A law dealing with taxation " is the first phrase—that is, taxation in any or all of its branches ; not a law dealing with the " imposition " of taxation—that is, with one particular and exclusive branch of taxation. To fail to observe this is to fall into the confusion the learned Chief Justice was trying to dispel. Then, referring to the false tacit assumption he has stated, he proceeds to show its error. He says, in a passage the meaning of which appears to have been entirely reversed (1) :—" That is not so. The terms are not synonymous. An Act *imposing taxation* may, like the English annual Finance Acts, both impose taxes and contain a *complete scheme for their collection*." The meaning that it has been, tacitly at all events, attempted to attach to those words is that that course may be taken under our Constitution. Nothing of the sort was intended. The learned Chief Justice was speaking of the traditional mode of taxation legislation. And his reference to the English Act shows it. And, further, it was for the very purpose of drawing the distinction between an Act " dealing with taxation " without restriction, and an Act dealing *only* with imposition of taxation. He goes on to show that by the next sentence : " Or the Act may *impose* taxation *eo nomine*, leaving its *collection* to be regulated by other laws." That is his example of an Act dealing *only* with the imposition. Observe the word " regulated," which is only an interchangeable term with " deal with." The learned Chief Justice used the words " deal with " at the foot of p. 336 in that sense. He has so far spoken of the well-understood branches of taxation legislation in order to apply the provisions of the Constitution to the Assessment Act No. 22 of 1910. He says : " Now, Act 22, when examined, does not on its face purport to impose taxation at all." He gives his reasons. He says : " The Act then goes on to make provision for assessing

(1) (1911) 12 C.L.R., at p. 336.

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and levying the tax, which it assumes to have been imposed by another Act." The " collection " is not the " imposition." It has nothing to do with the imposition except that it is the legal machinery by which the obligation declared by the imposition is effectuated. The distinction and the separateness of the two conceptions appear from the *Bill of Rights*. The imposition is the " grant " ; the collection (which includes assessment, levy, &c.) is the " manner." " Grant " is purely legislative, " collection " is purely executive and must be legislatively authorized. The Constitution enforces that separateness. Anticipating what I have to say as to the third proposition, I should point out that the learned Chief Justice there plainly refutes it. For, notwithstanding the incorporating section, he treats Act No. 22 of 1910 as having an independent existence, and not as being a " law imposing taxation." He emphasizes that by pointing out that the incorporating section may affect the Taxing Act No. 21 of 1910, which is a different matter. The observations of *Griffith* C.J. fully establish that, if it were permissible here to follow the example of the English Finance Act, the Senate could not amend a word of it, because it would not only be an Act " dealing with taxation," which embraces both imposition and collection, but it would be an " Act imposing taxation," because it dealt with imposition. That, of course, he could have never intended to sanction by any opinion of his. *Barton* J. says (1): " The provisions for assessment and collection are . . . proper to an Act not imposing taxation." This is relevant to the second proposition. As to the third, he negatives it (2), where he says that the reference section made the two Acts one, but only for the purpose of interpretation. Clearly that means for the interpretation of the Taxing Act. *O'Connor* J. is in exact concurrence on these points with *Griffith* C.J. He says as to the Assessment Act (3) that it " though *dealing with taxation*, does not . . . impose taxation, and is therefore not within the section." He does not suggest, but, in my opinion, denies, that it " deals with the imposition of taxation."

As to the third proposition, I have already added sufficient to my

(1) (1911) 12 C.L.R., at p. 350. (2) (1911) 12 C.L.R., at p. 343.
(3) (1911) 12 C.L.R., at p. 356.

original statement to indicate the admitted separateness of the Assessment Act so far as it is considered as a law in itself. Sec. 55 of the Constitution has, consequently, no application whatever to sec. 22 of the Act of 1925.

The result, so far as now material, is that the definitions of (1) "income from personal exertion," and of (2) "income from property," and of (3) "income tax," and of (4) "taxable income," are to be read as part of the Taxing Act. The first declares that income in relation to a business means "the proceeds" of the business—in other words, the gross receipts of the business in Australia. "Income tax" means the income tax imposed as such by "any Act" *as assessed under the Assessment Act*; and "taxable income" means the amount of income remaining after all statutory deductions allowed have been made. It is clear, therefore, that in view of the definition of "income" the Legislature, in declaring chargeability on a "percentage of the total receipts" of a business, makes no departure from the original subject of taxation, namely, "the proceeds" of the business. That is merely declaring, in respect of the particular total income, how much of it shall be "taxable income" and prescribing for the special purpose a method different from that prescribed for ordinary cases. I have more fully stated my reasons in this connection in the *British Imperial Oil Co.'s Case* (1), and I refer to that statement.

The only imaginable difficulty in the matter is occasioned by the words in sec. 28, "no taxable income" or less than the ordinary taxable income which might be expected to arise from the business. The difficulty, such as it is, arises really from the words "no taxable income," because it is said that, it being assumed by the section that there may be "no taxable income," there is necessarily a new subject of taxation, since in the Taxing Act itself the rates are declared only in respect of "taxable income." But that view overlooks the fact that "taxable income" in the Taxing Act is, in view of the incorporating section, to be interpreted as including every kind of "taxable income" declared by the Assessment Act, and is not limited to the ordinary "taxable income." In the generality of cases the primary definition of taxable income applies, but where

(1) (1925) 35 C.L.R., at p. 434.

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special cases are prescribed for we have to find what is "taxable income" from those special provisions. Sec. 28 is one of those special provisions. The words in that section "no taxable income," especially when read with the words immediately succeeding, are referable to the usual primary definition paragraph. But, says sec. 4, the definitions there given hold good "unless the contrary intention appears," and it seems to me transparently clear that the Legislature has contemplated in sec. 28 a case where the ordinary "taxable income" is or may be absent altogether and it expressly substitutes for that case another "taxable income" which equally falls within the scope of the Taxing Act. That is to say, the contrary intention apparent from the operative provisions of sec. 28 displaces and supersedes the primary definition and constitutes the "taxable income" for rate purposes within the meaning of the Taxing Acts. If the contentions of the respondent were sound, that sec. 28 proceeded upon the assumption that assessment and chargeability were independent of "taxable income," it would mean that no rate at all would be applicable, for there is none except on taxable income. Nor could I think that sec. 28 is an adoption of corresponding rates. It does not say so, and taxation must be unambiguously imposed. It cannot be implied to the destruction of all else the Legislature was enacting in the Assessment Act. The words used, "assessable and chargeable," are words that are outside "imposition" of taxation, and the word "imposing" or its corresponding form is not used. The words "income tax" in sec. 28 have, in the absence of contrary intention, and there is none, the primary meaning of "income tax imposed by any Act," that is, some other Act, in contradistinction to the words "as assessed under this Act." So that the simpler objection to liability, if the argument of the respondent is right, would be, not conflict with sec. 55 of the Constitution, but absence of any taxing statute to which sec. 28 is referable.

In brief my opinion is:—(1) Secs. 18 and 19 of the Act of 1925 are valid, and this appeal is competent. (2) The Board of Review is validly constituted and organized. (3) There is no breach of sec. 55 of the Constitution. (4) Sec. 28 of the Assessment Act is both valid and applicable to the relevant Taxing Acts. (5) As a

conclusion of law the appeal falls to be dealt with on its merits by the Court differently constituted.

British Imperial Oil Co. v. Federal Commissioner of Taxation.—This case originates in a different manner. It comes by way of a special case stated by the Supreme Court of Victoria exercising Federal jurisdiction pursuant to sec. 51A of the present Assessment Act. Unless sub-sec. 8 of sec. 51A is a nullity, this Court is competently seised of the special case and is bound to deal with it. The special case asks two questions which, in substance, are (1) whether the Deputy Commissioner's assessment of 28th March 1925 ceased to be valid or operative on the arising of the Company's dissatisfaction therewith; (2) whether it is now good in law. Assuming, as I have said in *Munro's Case*, that the Federal Parliament has the ordinary legislative power of retrospective enactment, sec. 16 of the Act of 1925, upon construction, answers the first question in the affirmative without any room for discussion. According to its terms sec. 28 of the Assessment Act at all material times consisted of its first and second sub-sections only and so the Deputy Commissioner's assessment was—subject to the revisionary rights created by sub-sec. 4 of sec. 50—of full force and effect. Par. (*b*) of that sub-section contains no challengeable matter, and that is the provision under which this special case finds its source. But par. (*a*) is challenged for reasons pertinent to the Board of Review and dealt with in *Munro's Case*. The denial of constitutional invalidity is stated in my judgment in *Munro's Case*, and it ends any question of vitiation of par. (*b*). But I would add that, even if par. (*a*) were held to be bad, it would not, in my opinion, so infect par. (*b*) as to render it void. Both the terms of the extant legislation and history demonstrate to my mind that Parliament did not so bind the two sets of provisions together as to make them inseparable in the sense contended for. The Courts were always there and have always been intended to be there, and it might well be argued that the power of appeal to the Courts is an essential and inseparable condition of liability. But the Board of Review is merely additional and in a sense extraneous, and its omission would not annihilate the curial appeals. The Board of Review was merely engrafted on the parent tree, and whether it flourishes or fades the tree remains.

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I answer question 1 in the negative and question 2 in the affirmative.

Federal Commissioner of Taxation v. Munro (The Objection).—The concrete question left is whether the objection of the taxpayer, so far as allowed by what must be regarded as the Board of Review, should be allowed or not. It should be noted that, as this matter arises in original jurisdiction and not by way of appeal in the strict constitutional sense, the ordinary rules applicable to reconsideration of determinations of fact of tribunals of first instance do not apply. That, of course, does not prevent the Court from giving in suitable cases—of which this is not one—all proper weight to determinations of fact resting on practical experience of the administrative body.

The facts come to us in a somewhat irregular manner, due largely to the former confused state of the law. They are not in any material point in dispute, the only difference between the parties being as to the effect of the law in relation to them. That the decision of the Board involves a question of law seems to me clear. Besides the contest as to the validity of the statutory provisions regarding the Board of Review, there is the seriously debated question as to the construction of sec. 23 (1) (*a*) and sec. 25 (*e*). This opens the whole matter for our decision (see and compare *Brooks* v. *United States* (1)). The relevant facts, when collected, are these :—The respondent carried on a business in Elizabeth Street, Melbourne, occupying for that purpose part of land and a building belonging to him. Other portions of the building he let at rentals amounting to £2,000 a year. In those circumstances he promoted a limited company in Sydney to carry on business there. He took up about 2,000 shares for himself in the company and 9,000 shares for each of his two sons. He borrowed from a bank a sum which during the relevant period amounted to about £33,000, of which £20,000. approximately represented the amount paid for the shares and £13,000 the amount he advanced to the Sydney company free of interest. To secure to the bank the repayment of his loan he mortgaged the Elizabeth Street property and during the relevant accounting periods he paid interest upon his mortgage. His objection

(1) (1925) 267 U.S. 432, at p. 439.

is that he should be allowed to deduct that interest from the assessable income in Melbourne—either business or property—there being no Sydney income. His right to do so is rested on sec. 23 (1) (*a*). This is denied by the Commissioner, who relies also on the negative provision in sec. 25 (*e*). If the affirmative provision relied on for the taxpayer does not warrant the deduction, he necessarily fails. I am of opinion that that provision does not justify the deduction claimed. I am unable to see how the interest referred to was "actually incurred in gaining or producing the assessable income." "The assessable income" means the income which is taken as a basis as required by the introductory words of the section. It is said for the respondent that, since it was necessary to pay the interest if the taxpayer wished to retain his right to have the income from the property, it was interest by which that income was gained or produced. I am not able to accept that view. The taxpayer had already acquired and held his property as a rent-producing property to the full extent. Nothing more was necessary to gain or produce that income. Then he chose for his own purposes quite alien to that property to borrow money and incur a personal obligation to repay it with interest. So far, also, the property stood complete as a rent-producing instrument. But because he secured his personal debt by means of that complete rent-producing instrument he contends that the discharge of the obligation was "actually incurred in gaining or producing" the rentals it yielded. The simple position is that the property and its rentals existed before the loan and remained intact and unaltered after the loan. Had the money borrowed been expended on the property so as to increase the rentals or so as to prevent depreciation which would have reduced the rentals, then it could have been properly said that the interest had been a means of gaining or producing the assessable income. But in employing the borrowed money for purposes independent of the property, leaving its condition entirely unaffected, that result cannot be postulated. Nor is there any ground for attaching the loan to "the assessable income" arising from the business in Melbourne. That income and the whole Melbourne business were quite unaffected by the application of the money. In short, the interest paid to the bank was not paid to *create* any

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of the assessable income in question: it was incurred because, among other things, that income was in a manner of speaking already in existence. Supposing, however, the expenditure fell within sec. 23 (1) (*a*), it would be excluded by sec. 25 (*e*). Clearly the production of "assessable income" was not the only purpose of the loan. That loan was to create a new enterprise owned and conducted by a new personality, having legal results which, both as to *commodum* and *onus*, must be accepted by the taxpayer, results which are distinct from and in addition to any "assessable income." The interest paid in respect of the loan follows accessorially the purpose of the principal sum.

I am of the opinion that the appeal so called should be allowed, and the objection disallowed.

HIGGINS J. *Federal Commissioner of Taxation v. Munro.*—The Commissioner in this case has appealed from a decision given by a Board of Appeal constituted under the *Income Tax Assessment Act* 1922-1924. The decision of the Board on an appeal to it from the Commissioner's assessment was given in favour of the taxpayer on 21st January 1925; and the Commissioner on 17th February 1925 gave notice of appeal to this Court. The decision was to the effect that interest paid by the taxpayer on a bank overdraft should be deducted from rents received by the taxpayer from Melbourne city property, which are treated by the Commissioner as income from property. The money was borrowed by the taxpayer on overdraft for the purpose of a Sydney enterprise. The procedure until the notice of appeal to this Court was in conformity with the directions of the *Income Tax Assessment Act* 1922-1924.

There are in fact two appeals; but they relate to two successive financial years, 1921-1922 and 1922-1923, and involve the same points.

But before the appeals to this Court came on for hearing, a judgment was given by this Court on 9th April 1925 in a case of *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (1), to the effect that the Board of Appeal was an invalid body under the Australian Constitution, that it had no legal existence, and that a special case stated by the Board for the opinion of this Court must be

(1) (1925) 35 C.L.R. 422.

struck out of the list. Subsequently, and no doubt in consequence of this decision of the High Court, Parliament passed an Act which became law on 26th September 1925 (No. 28 of 1925) amending the Assessment Act of 1922-1924, substituting a "Board of Review" for the Board of Appeal, and making other changes.

The ground on which the Court declared the Board of Appeal to be an invalid body was that the members had not a life tenure in their office (sec. 41 of the Assessment Act 1922-1924), and that none but persons having a life tenure can exercise any of the judicial power of the Commonwealth. This Court held that the decision of the Board was an exercise of the judicial power of the Commonwealth, and that for the exercise of the judicial power a life tenure is necessary. It was, indeed, expressly decided in *Alexander's Case* (1) that sec. 72 of the Constitution requires the Justices of all the Courts created by the Federal Parliament to have a life tenure. Personally, I was one of the dissentients in *Alexander's Case*, but I am bound by the decision. Counsel for the Commissioner has intimated that he disputes the correctness of the decision, but he has not thought fit to adduce any arguments on the subject to our Bench.

But when the present case came up for argument before us, counsel for the taxpayer contended that the new Board of Review was also an invalid body, as well as the Board of Appeal; and for the same reasons. This question has to be settled before we can decide on the merits as to the deduction made by the Board. But, so far as I can see at present, if the Board—whether Board of Appeal or Board of Review—has no legal existence, the assessment of the Commissioner must hold good, without the deduction claimed (sec. 39 of Act 1922-1924; sec. 16 of Act No. 28 of 1925).

I must add here, merely as a summary statement of secs. 16-22 of Act No. 28 of 1925, that all assessments, decisions, objections, pending cases, &c., are to be treated retrospectively as if they were under this new Act No. 28 of 1925.

It is clear that when, at the request of a dissatisfied taxpayer, a decision of the Commissioner was referred (as in this case) to the Board of Appeal, power was conferred on the Board to make such

(1) (1918) 25 C.L.R. 434.

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order as it thought fit and to either reduce or increase the assessment (Assessment Act 1922-1924, sec. 51 (1)); and a similar power has been conferred on the Board of Review by the Act No. 28 of 1925 (sec. 51 (4)); but the question remains, was the Board of Appeal, or is the Board of Review, for that reason necessarily to be treated as a Federal Court or body exercising the judicial power of the Commonwealth. If the Board must be so treated, then according to *Alexander's Case* (1) it was invalid as a Federal Court, because the members have only a seven years' tenure (sec. 41 (4)). On the other hand, if the existence of the Board can be justified as an administrative aid to the Commissioner, as a piece of machinery devised to guide the Commissioner to a correct conclusion in giving the very responsible decisions which he has to give, secs. 71 and 72 of the Constitution do not apply to the Board at all. Now, Parliament has been given power, by sec. 51 of the Constitution, to make laws "with respect to . . . taxation"; and who is to set bounds to that power? The power extends even to making laws with respect to "matters incidental to the execution of any power vested by this Constitution in the Parliament" (sec. 51 (xxxix.)); and Parliament can, prima facie, provide any precautions that it thinks fit, can devise any machinery that it thinks fit, can give the Commissioner the assistance of other persons for the discharge of his functions in respect of taxation. The Acts do not call this Board a "Federal Court"; though, if in substance it be given functions which are inconsistent with anything but a Federal Court exercising the judicial power of the Commonwealth, the name would matter little. It certainly is not a Court of Record. It has no power of enforcement—no power to enforce its decisions. It has no general jurisdiction—no jurisdiction over civil or criminal controversies—no jurisdiction except to deal with the decisions of the Commissioner under the specific Acts as to income tax. The Board cannot function unless the Commissioner or the taxpayer invoke its aid. Under sec. 51 (2) of the Assessment Act 1922-1924, the order of the Board of Appeal on questions of fact is final and conclusive on all parties; under sec. 12 of the Act of 1925 (sec. 51 (6) of the Act 1922-1925), the decision of the Board of Review

(1) (1918) 25 C.L.R. 434.

is not subject to appeal to the High Court unless it involves a "question of law," and then the whole order both as to facts and law appears to be subject to the High Court's power. But there are similar provisions in favour of the Commissioner's assessment (sec. 39); and the Commissioner is not a Court exercising the judicial power (*Cornell* v. *Deputy Federal Commissioner of Taxation* (1)). The proper presumption to be applied is that Parliament intended to obey the decision in *Alexander's Case* (2), and that, however freely Parliament has used words familiar in legal procedure, such as "decision," "appeal," &c., it merely provided the Board as auxiliary to the Commissioner in his administrative functions. The Commissioner has the "general administration" of the Act (sec. 6). The fact that the Commissioner has to consider the law as well as the facts of each case presented to him does not make him a judicial officer. The fact that a policeman has to consider the law as well as the facts in exercising his power to arrest does not make him a judicial officer; and if Parliament provide the Commissioner with a Board to assist him as to law or facts it does not thereby make him or the Board a judicial officer; much less does it make the Commissioner or the Board into a Court or judicial body, exercising the judicial power under Chapter III. of the Constitution.

In my opinion, the Board, whether it be called a Board of Appeal or Board of Review, cannot properly be treated as a Federal Court of the kind contemplated by sec. 71 of the Constitution, and sec. 72 of the Constitution does not apply to it. The Board ought to be treated as a mere piece of administrative machinery. My opinion applies to the Board of Appeal as well as to the Board of Review; for my learned colleagues have, on the second argument, permitted counsel to discuss the propriety of the decision in *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (3). I concur with Mr. *Dixon* that no substantial distinction can be drawn between the Board of Appeal and the Board of Review as to validity.

It is reassuring to find that this view of the Board of Appeal or Board of Review, that it is a mere administrative tribunal not exercising the judicial power of the Commonwealth, is confirmed by

(1) (1920) 29 C.L.R., at p. 47. (2) (1918) 25 C.L.R. 434.
(3) (1925) 35 C.L.R. 422.

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numerous cases under the United States Constitution. Under that Constitution no Federal Court can be created if the members have not a life tenure—a tenure "during good behaviour." By art. III., sec. 1—"The judicial power of the United States shall be vested in one supreme court, and in such inferior courts, as the Congress may, from time to time, ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their offices during good behaviour." These words are very clear; and yet it has been held that Courts of special jurisdiction may be created by Congress although the members of the Courts have a mere tenure for years. This principle has been applied to Courts created by Congress for the Territories (*American Insurance Co.* v. 356 *Bales of Cotton* (1)). It has been applied to special tribunals for the settlement of claims against the United States to lands derived by the United States from Mexico (*United States* v. *Coe* (2); *United States* v. *Ferreira* (3); *United States* v. *Ritchie* (4)). It has been applied to commissioners and examiners of patents (*Butterworth* v. *Hoe* (5); *United States* v. *Duell* (6)). It has been applied to the Inter-State Commerce Commission (*Kentucky and I. Bridge Co.* v. *Louisville and N. R. Co.* (7); *Willoughby's Constitutional Law of the United States*, vol. I., p. 369; vol. II., pp. 970, 1276). In my dissenting judgment in *Alexander's Case* (8) I referred to these cases in the discussion as to the exercise of judicial power. I infer, also, that in the United States the judicial power would not be regarded as exercised by a tribunal if the tribunal has not been given the power to enforce the results of its decisions. "That judicial power essentially involves the right to enforce the results of its exertion is elementary" (*Virginia* v. *West Virginia* (9)). Neither Board of Appeal nor Board of Review has been given this power of enforcement under our Assessment Acts. The assistance of some legitimate Federal Court is necessary for the execution of any decision of the Board of Appeal or Board of Review; and although the decision of the Board of Appeal is made final and conclusive as to facts (sec. 51 (2) of the

(1) (1828) 1 Peters 511.
(2) (1894) 155 U.S. 76.
(3) (1851) 13 How. 40.
(4) (1854) 17 How. 525, at p. 534.
(5) (1884) 112 U.S. 50.
(6) (1899) 172 U.S. 576.
(7) (1889) 37 Fed. Rep. 567.
(8) (1918) 25 C.L.R., at p. 476.
(9) (1918) 246 U.S., at p. 591.

Assessment Act 1922-1924), that is a mere rule of evidence for the Court. I should infer that the decision of the Board of Review has the same conclusive effect where no question of law is involved (sec. 51 (6) of the Act 1922-1925); but this does not make the Board of Review a tribunal exercising the judicial power of the Commonwealth. In a very recent article in the *Harvard Law Review* written by Professor *Frankfurter* (March 1926) there is an interesting account of the increasing pressure for tribunals of special jurisdiction for the purposes of commerce, customs, patents, land claims, &c.; and it is not difficult to imagine the extreme disaster to efficient administration if Congress, in creating such tribunals, were bound by all the conditions applicable to Federal Courts exercising the judicial power.

Even in England, where Parliament is omnipotent, the distinction between bodies such as justices, when exercising administrative duties as distinguished from judicial duties, is well recognized. In *Royal Aquarium &c. Society* v. *Parkinson* (1) it was held that neither a justice of the peace nor a member of the London County Council was entitled to absolute privilege for his words on applications for music and dancing licences, although he would be entitled thereto in an exercise of judicial power; on such applications his office is consultative for the purposes of administration and not judicial, although he has to decide both law and facts.

In my opinion the power to make laws "with respect to . . . taxation," conferred by sec. 51 of our Constitution, can be reconciled with the power conferred by sec. 71 to create Courts for the exercise of the judicial power of the Commonwealth.

Even in this High Court it has been held, on a similar line of reasoning, that another section in the judicature part of the Constitution, Chapter III. (sec. 80), which provides for trial by jury on indictment for any offence against a law of the Commonwealth does not apply to trials on indictment for offences under laws made by the Commonwealth for Papua, a territory (*R.* v. *Bernasconi* (2)). According to *Griffith* C.J., "Chapter III." of the Constitution "is limited in its application to the exercise of the judicial power of the Commonwealth in respect of those functions of government as to which it stands in the place of the States, and has no application to

(1) (1892) 1 Q.B. 431.

(2) (1915) 19 C.L.R. 629.

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territories" (1). (See also *Buchanan* v. *Commonwealth* (2); and *Mitchell* v. *Barker* (3).)

If the view which I have stated is right—that the Board of Appeal of the Act 1922-1924 is just as valid as the Board of Review of the Act of 1925, it becomes unnecessary to consider the argument that secs. 18 and 19 of the Act of 1925 are invalid, which purport to make a decision given by the Board of Appeal as valid as if given by the new Board of Review. But if the Board of Review is to be treated as valid and if the Board of Appeal is to be treated as invalid, it is to my mind clear that secs. 18 and 19 are invalid. For if Parliament was forbidden by the Constitution to create the Board of Appeal, and if the decision of the Board was therefore void in law, Parliament cannot make valid retrospectively that decision which it could not make valid prospectively (*Williams* v. *Supervisors of Albany* (4)).

For the reasons given in my judgment in *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* this day, I am of opinion that there has been no breach of sec. 55 of the Constitution.

As for the merits of this appeal, I am of opinion that the Commissioner was right and that the Board of Appeal was wrong. Where rents are received from property, and an overdraft is obtained by the taxpayer on the security of the property for the purposes of another enterprise or speculation, the interest paid by the taxpayer cannot be treated as a deduction from the rents for the purpose of the Income Tax Acts. The position is, to my mind, so obvious that I should serve no useful purpose by amplifying my reasons. I have read the judgment of the Chief Justice as to the merits, and I respectfully concur therewith, both as to reasoning and as to result.

British Imperial Oil Co. Ltd. v. Federal Commissioner of Taxation.—This is a case stated by the Supreme Court of Victoria for the opinion of this High Court as to law. It is stated under sec. 51A, sub-sec. 8, of the Assessment Act 1922-1925. By permission, the case has been argued with *Munro's Case*; but the position is very different.

On 28th March 1925 the Commissioner sent to the Company a

(1) (1915) 19 C.L.R., at p. 635.
(2) (1913) 16 C.L.R. 315.
(3) (1918) 24 C.L.R. 365, at p. 367.
(4) (1887) 122 U.S. 154.

notice of assessment as under sec. 28 of the Act 1922-1924; on 4th May following the Company lodged its objections (under sec. 50 (1)); on 26th September following, the amending Assessment Act No. 28 of 1925 was passed; on 1st December 1925 the Commissioner disallowed the objections; on 24th December the taxpayer requested the Commissioner to treat the objections as an appeal and to forward them to the Supreme Court (sec. 50 (4)). On 29th April 1926 the Commissioner forwarded the objections to the Supreme Court under sec. 51A (1); and on 7th May 1926 the Supreme Court stated this case in writing for our opinion.

The objections taken by the Company under sec. 50 (1), through its public officer, are 10 in number: they have to be closely scrutinized. "I claim that the assessment herein should be based upon the ordinary taxable income of the said Company ascertained by reference to actual income received according to the provisions of the *Income Tax Assessment Act* other than sec. 28. If contrary to my contention the provisions of sec. 28 of the said Act be applied, then assessment should be upon a lower percentage than 10 per cent. My reasons for claiming that the assessment is objectionable are:— (1) That the said assessment is wrong in law and excessive. (2) That the business of the said British Imperial Oil Co. Ltd. is not controlled principally by persons resident outside Australia. (3) That the said business produces taxable income. (4) That the said business does not in fact produce less than the ordinary taxable income which might be expected to arise from that business or from such a business as that carried on by the said Company and does not or should not appear to the Commissioner so to do. (5) That, by reason of objections 2, 3 and 4, sec. 28 cannot or ought not to be applied. (6) That if sec. 28 is applied the percentage (10 per cent) of the total receipts of the said business on which the said Company through me its public officer has been assessed and charged with income tax is not a proper percentage and/or is not a percentage which the Commissioner in his judgment properly exercised thinks proper. That if sec. 28 is not applied the said percentage is not and does not represent the actual income of the said Company. (7) That sec. 28 of the *Income Tax Assessment Act* 1922-1924 is *ultra vires* of the Parliament of the Commonwealth of

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Australia and is void. (8) That the *Income Tax Assessment Act* 1922-1924 and the *Income Tax Act* 1924 are *ultra vires* of the Parliament of the Commonwealth of Australia and are void. (9) That the assumed or fictional income upon which the assessment is based is not income arising from sources in Australia. (10) That the assumed or fictional income aforesaid is extra-territorial." The assessment in question is for the financial year 1924-1925, and is based on income received in 1923-1924; and it will be seen from the form of these objections that the Commissioner, as under sec. 28 of the Assessment Act 1922-1924, has assessed the Company for income tax on 10 per cent of the total receipts of the business carried on in Australia. The first six objections go to the merits, that is to say, to the application of sec. 28, and its meaning; but the objections 7 to 10 attack the validity of the section and of the Act itself.

Taking objection 7, it is argued that when the objections were lodged (4th May 1925), sec. 28 included a sub-section, sub-sec. 3, which has been declared by this Court to be *ultra vires* in *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (1), and that, this sub-section being *ultra vires*, the rest of the section is not severable, and the whole section is invalid.

My opinion—as I have just stated in my judgment in *Federal Commissioner of Taxation* v. *Munro*—is that sub-sec. 3, providing for a reference to a Board of Appeal, is not invalid; and therefore the question of severability does not arise, and the section with sub-sec. 3 is not invalid because of sub-sec. 3. Sub-sec. 3 said: "A taxpayer who is dissatisfied with the decision of the Commissioner under this section may require the Commissioner to refer his case to a Board of Appeal, and the Commissioner shall refer the case accordingly." It is true that after the objections were lodged the amending Act No. 28 of 1925 was passed, substituting a Board of Review for a Board of Appeal; but this fact does not affect the question with which I am dealing. In my opinion sec. 28 is not *ultra vires* of the Parliament, and is not void.

As for objection 8, that the Assessment Act 1922-1924 and the Taxing Act 1924 are *ultra vires* and void, it rested on the same

(1) (1925) 35 C.L.R. 422.

ground of alleged invalidity of the Board of Appeal, and the consequent invalidity of the whole taxing scheme as unseverable; and the same opinion applies.

As for objections 9 and 10, the point taken is that the assumed or fictional income based on gross receipts is not income "derived from sources in Australia" within the meaning of sec. 4 of the Assessment Act (definitions). But Parliament in taxing income derived from sources in Australia is entitled to adopt any methods, even rough-and-ready methods, for ascertaining the income so derived; and Parliament is entitled to give such powers and discretions to the Commissioner for this ascertainment as it thinks fit.

Counsel for the Company have supplemented the objections by argument as to the effect of sec. 55 of the Constitution. They urge that the Assessment Act is a law imposing taxation; that it contains matters other than the imposition of taxation; and that it deals with more than one subject of taxation. There is no reference in the objections to sec. 55; and there is no ground of objection taken that covers the points now taken as to sec. 55. Clearly, objection 7 does not cover these points. Objection 7 is that sec. 28 of the Assessment Act is *ultra vires of the Parliament* and "is void"; whereas if sec. 55 of the Constitution be disobeyed, sec. 28 would not be void, though all the other provisions would be of no effect. The objection is obviously directed to the point that Parliament has no power at all, in any form of legislation, to enact sec. 28; but no one denies that Parliament has power to impose any taxation. The only restriction is that the Act must not deal with anything but taxation. As for the second branch of sec. 55, forbidding a law which deals with more than one subject of taxation, the effect of disobedience is not expressly stated; but even if the effect be similar to that of disobedience to the first branch, objection 7, that sec. 28 is "void," is also inapplicable. Sec. 55 of the Constitution does not deal with the limits of powers of the Parliament; and no one denies that the Parliament has power to impose taxation, or to tax more than one subject. Sec. 55 in its first branch, if disobeyed, would leave sec. 28 operative, but would make all the other sections inoperative; whereas objection 7 is that sec. 28 is "void." The effect of disobedience to the second branch

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of sec. 55 is not certain ; but whatever be the effect the objections do not cover the question.

Now, by sec. 51A (3), the taxpayer whose objections are forwarded to the Court is limited, on the hearing of the appeal, to the grounds stated in his objections ; and the two questions asked by the learned Judge are therefore to be limited to these grounds. The questions are :—" (1) Did the said assessment cease to be operative upon the arising of the dissatisfaction of the appellant therewith ? (2) Is the assessment appealed against good in law ? " These questions must be confined to the objections lodged. For the purpose of carrying out the procedure prescribed in sec. 51A of the Act 1922-1925, the opposing party—in this case the Commissioner—has, as it were, a vested interest which entitles him to hold his assessment as to all grounds not stated in the taxpayer's objections. The procedure here chosen by the taxpayer limits him to the grounds of objection which he has stated. There is nothing in the Act forbidding other procedure ; and, though it is not necessary for my decision in this case, I may say that I am not at all satisfied that a person assessed wrongly (e.g., a charitable institution) could not wait till he be sued and then defend the action.

In my opinion there is no substance in the objections numbered 1 to 6. Even if one should regard the course taken by the Commissioner as harsh and autocratic, it is the course authorized by the Parliament, and validly authorized ; and Parliament has power to act unjustly.

But, as my learned brothers are of opinion that it is our duty to answer the arguments based on sec. 55 of the Constitution, it is my duty, I think, to answer also in order that the views of the Full Bench may be complete.

In my opinion—(1) The Assessment Act 1922-1924 is not a law imposing taxation within sec. 55 ; nor is the Assessment Act 1922-1925. The law which imposes income tax for 1924-1925 is the Tax Act No. 50 of 1924. (2) The Tax Act No. 50 of 1924 " deals only with the imposition of taxation," and there is no provision therein dealing with any other matter. (3) The Tax Act No. 50, by sec. 2 thereof, incorporates the Assessment Act 1922-1924, which is to be read as one with the Act No. 50 ; yet the conjoint Act " deals only

with the imposition of taxation." (4) The Tax Act No. 50 deals with one subject of taxation only—income. (5) Sec. 28 of the Assessment Act does not introduce a new subject of taxation—gross receipts. It merely provides an exceptional standard by which the Commissioner may fix taxable income in an exceptional case where the ascertainment of the taxable income is exceptionally liable to abuse or evasion. All receipts are income; and they are taxable after the authorized deductions (if any) are allowed. (6) It is not correct to say that sec. 28 purports to allow income tax where there is no income; in effect, it says merely that the Commissioner may assess for income tax a percentage of the total receipts from the business in Australia where the evidence before him is insufficient to show the true income or any income of that business —where "*it appears* to the Commissioner that the business produces either no taxable income or less than the ordinary taxable income." A firm that carries on business in London as well as in Australia can easily hide the profits of its Australian business by increasing the invoiced prices of the goods sent to Australia.

I need not expatiate at length on these conclusions. But (1) it is the Act No. 50 that expressly "imposes" the tax. If there were no such Act applicable to the year 1924-1925, if Parliament failed to pass such an Act, there would be no income tax. As I have said already in the recent case of *Commissioner of Stamps* (*W.A.*) v. *West Australian Trustee, Executor and Agency Co.* (1), the explosive is laid ready by the Assessment Act, but it is the yearly Tax Act which communicates the spark.

(2) and (3) It is a mistake to treat the first part of sec. 55 as if it said "Laws imposing taxation shall only impose taxation." The words used allow much freer scope—such laws must "*deal only with* the imposition of taxation." I am still of the same opinion on this point as I expressed in *Osborne* v. *Commonwealth* (2). So far as I see, there would be nothing to offend against the Constitution if all the provisions of the Assessment Act were actually inserted in the Taxing Act; but the present course is, no doubt, more convenient. In *National Trustees, Executors and Agency Co. of Australasia* v.

(1) *Ante*, 63, at p. 69.

(2) (1911) 12 C.L.R., at p. 373.

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Federal Commissioner of Taxation (1) the late *Griffith* C.J. said as to the *Estate Duty Act* and the *Estate Duty Assessment Act*: "The two Acts read together are, as was pointed out in *Osborne* v. *Commonwealth* (2), a law imposing taxation."

But although this statement is, no doubt, the logical result of the express incorporation of two such Acts, it is clear from the words of sec. 53 of the Constitution as to "proposed laws," that the one and only Bill which is excepted from the Senate's power to amend is the taxing Bill, the Bill that purports to impose the tax; and similarly, it is only the Act that imposes the tax, the taxing Act, which is subject to the prohibition in the first part of sec. 55. Yet even if all the provisions of the Assessment Act were actually incorporated in the one Taxing Act No. 50, I am of opinion that the conjoint Act would not offend against the prohibition.

In my opinion, our answer to the two questions asked in the case as stated should be confined within the limits of the objections taken by the taxpayer, and should be, as to question 1, No; as to question 2, Yes.

RICH J. I concur in the opinion that the Acts attacked in these cases are valid. As I was a party to the decision in the *British Imperial Oil Co.'s Case* (3), I think it right to state that I adhere to that decision. In *Munro's Case* I agree that the Commissioner arrived at the right conclusion and that the appeal should be allowed. In the *British Imperial Oil Co.'s Case* I answer the questions submitted as follows: (1) No; (2) Yes.

STARKE J. These cases were heard together and, though arising under different circumstances, involve in the main the same legal considerations. In both cases it is contended that Parliament cannot confer the judicial power of the Commonwealth, or any part of it, upon a tribunal constituted as are the Boards of Review under the *Income Tax Assessment Act* 1922-1925 (*Alexander's Case* (4); *British Imperial Oil Co.'s Case* (3)), and that it may be none the less judicial power because the purpose of the power is to aid

(1) (1916) 22 C.L.R., at p. 371.
(2) (1911) 12 C.L.R. 321.
(3) (1925) 35 C.L.R. 422.
(4) (1918) 25 C.L.R. 434.

administrative bodies or officers in the performance of their duties (*Inter-State Commerce Commission* v. *Brimson* (1)).

The decisions in *Munro's Case*, the subject of the present appeals to this Court, were made by Boards of Appeal constituted under the *Income Tax Assessment Acts* 1915-1921 and 1922; but this Court held that these Acts purported to invest that tribunal, which was not a Court, with judicial power, and thereby violated the Constitution (*British Imperial Oil Co.'s Case* (2)). The Commissioner had appealed against these decisions to this Court; but after the appeals were instituted, and in consequence of the decision in the *British Imperial Oil Co.'s Case*, the *Income Tax Assessment Act* 1925 (No. 28 of 1925) was passed.

That Act established Boards of Review, and endeavoured to remove from those tribunals the indications of judicial power which had, in the *British Imperial Oil Co.'s Case* (2), brought down the Boards of Appeal established under the Acts already referred to. The general intent to avoid those dangers is clear enough, but the functions and authorities conferred upon the Boards of Review must nevertheless be examined. The provisions of secs. 18 and 19 of the Act of 1925 govern *Munro's Case*, whilst secs. 50, 51 and 51A of the *Income Tax Assessment Act* 1922-1925 govern the *British Imperial Oil Co.'s Case*. (See *Income Tax Assessment Act* 1922-1924 and amending Act of 1925, secs. 11 and 12.) By secs. 18 and 19 it is enacted that decisions of persons purporting to act as a Board of Appeal shall be deemed to be and at all times to have been a decision upon review, and as valid and effectual as if they had been given by a Board of Review constituted pursuant to the provisions of the amending Act; and further, that in any case in which the Commissioner or the taxpayer had instituted or purported to institute an appeal to the High Court from a decision of a Board of Appeal the Commissioner or the taxpayer might appeal to this Court from that decision as if it were a decision of a Board of Review if, in the opinion of the High Court, it involved a question of law.

It was said that these sections constituted an attempt by Parliament itself to exert the judicial power of the Commonwealth, and were therefore in contravention of the Constitution; but I cannot

(1) (1894) 154 U.S. 447.

(2) (1925) 35 C.L.R. 422.

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agree. Parliament simply takes up certain determinations which exist in fact, though made without authority, and prescribes, not that they shall be acts done by a Board of Review, but that they shall be treated as they would be treated if they were such acts. The sections, no doubt, apply retroactively, but they do not constitute an exercise of the judicial power on the part of the Parliament. The functions of the Board of Review must, therefore, be considered.

It has power to review the assessments of the Commissioner, and its decisions are to be deemed to be assessments, determinations or decisions of the Commissioner (Act No. 28 of 1925, sec. 10). Now, the Commissioner causes assessments to be made for the purpose of ascertaining the taxable income upon which income tax shall be levied (Act 1915-1921, sec. 31 ; Act of 1922, sec. 35). His function is to ascertain the amount of income upon which the tax is imposed. That does not, in my opinion, involve any exercise of the judicial power of the Commonwealth : it is an administrative function. The decision of a Board of Review stands, as we have seen, precisely in the same position. Its functions are in aid of the administrative functions of government. So far, then, a Board does not exercise the judicial power of the Commonwealth.

We then come to the right of appeal to this Court from determinations of Boards of Review. That is a right given both to the Commissioner and to the taxpayer. A right of appeal in itself does not establish the vesting of judicial power either in the Commissioner or in a Board of Review. The Parliament may have imposed upon the Courts the duty of reviewing administrative determinations. If such determinations can be tested by some rule of law, there is no constitutional difficulty in remitting the matter to the judicial power (cf. *Willoughby on the Constitution*, p. 1276 ; *Butterworth* v. *United States, ex rel. Hoe* (1)). If it cannot be conferred on this Court as appellate jurisdiction, then it may be conferred as original jurisdiction (cf. Constitution, secs. 73 and 76). The grant of the right of appeal to this Court does not, therefore, alter the essentially administrative character of the functions which are conferred upon the Commissioner and the Boards of Review under the *Income Tax*

(1) (1884) 112 U.S. 50.

Assessment Acts. The actual decision in the *British Imperial Oil Co.'s Case* (1) was, having regard to the decisions of this Court and the provisions of sec. 10 (38 (8)) of the Act No. 31 of 1921, I still think, right, but it affords very little guide to the construction of the enactments now before the Court, and is certainly not an authority upon the meaning and effect of the provisions which fall for determination in the present cases.

The same result must follow as to the provisions in relation to Boards of Review in secs. 50, 51 and 51A, but the British Imperial Oil Co., it must be observed, did not appeal to a Board of Review but to the Supreme Court of the State of Victoria, and the provision for an appeal to the High Court or a State Court is, in my opinion, entirely severable from appeals to a Board of Review. It is not, therefore, necessary to rely upon sec. 16 of the Act No. 28 of 1925.

Another argument must also be examined. It was based upon the provisions of sec. 55 of the Constitution, and was developed under four propositions :—

(1) That the Assessment Acts No. 37 of 1922 and No. 28 of 1925 are laws imposing taxation. It was pointed out that a law imposing taxation was more limited in scope than a law with respect to taxation (Constitution, sec. 51 (II.)), and that the constitutional practice of the Parliament of Great Britain with reference to Money Bills (*Anson's Law and Custom of the Constitution*, 4th ed., vol. II., "Money Bills," sec. 111, p. 268) afforded but little assistance in the interpretation of sec. 55.

Then it was argued that the essence of laws imposing taxation was that they either defined the object or the subject of the tax, or fixed or measured its amount. Consequently, whenever an Act imposed a duty upon anyone to pay tax, then that was a law imposing taxation. The provisions of secs. 17, 21, 22 and 28 of the Assessment Act of 1922 were referred to as imposing such a duty and therefore establishing this Act as a law imposing taxation. These very arguments were addressed to the Supreme Court of Victoria in *Stephens* v. *Abrahams* [*No.* 2] (2), but without success. *à Beckett* J. in that case said (3) : "We have to say what is meant by

(1) (1925) 35 C.L.R. 422.
(2) (1903) 29 V.L.R. 229; 24 A.L.T. 216.
(3) (1903) 29 V.L.R., at p. 251; 24 A.L.T., at p. 220.

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a law, and at what period it is to be regarded in considering whether it imposes taxation or not. I should say that 'law' means the Act of Parliament—that is, the document to be construed; the time at which we are to regard it in applying the test is that at which the Act comes into force": and again (1):—"But the best reason for saying that the time when it passes is the time to be considered seems to me to be that the section is intended to secure the observance of certain rules of parliamentary procedure and the preservation of certain rights as between the two Houses at the time when the proposed measure is being made into law. If these are then observed, and the measure is launched, its framers having observed the conditions of sec. 55, they have exercised their constitutional rights, and have broken through no constitutional restrictions. Their Act is good once and for all, and not to be retrospectively invalidated because some subsequent exercise of legislative authority gives it an operation which it had not when it left their hands." Those observations of the learned Judge are, in my opinion, an accurate statement of the law.

Now secs. 17, 21, 22 and 28 of the Assessment Act of 1922 do not, in themselves, impose any tax. They are declaratory, or are for the purpose of interpretation and definition of, or sanctioning deductions from, a tax otherwise imposed. Likewise secs. 16, 17, 18 and 19 of the Assessment Act of 1925 do not in themselves impose any tax upon the subject; they are machinery provisions for carrying out and enforcing a tax otherwise imposed (e.g., the *Income Tax Act* 1922, No. 38).

Sec. 28 of the Assessment Act of 1922, perhaps, requires a little amplification. It does not *per se* impose any tax. Income tax is imposed by the relevant Tax Acts, at rates and amounts declared in those Acts. Those Acts, however, do not define income, nor do they prescribe the persons who are to pay the tax or the standards by which income is to be fixed. All that is left to the Assessment Act, and the object of sec. 28 is to prescribe a standard for fixing or estimating income in a particular case. It takes the total receipts as the source of income and then prescribes a percentage on those receipts as the standard for assessing income; but it is

(1) (1903) 29 V.L.R., at p. 254; 24 A.L.T., at p. 221.

said that the case in which that standard is prescribed is one in which there is no taxable income. That is true; but it means no taxable income in reference to other standards set up by the Act, and therefore requiring a standard of its own. It is no secret that income tax has been avoided by companies and traders resident outside Australia setting up local companies to trade in Australia, and supplying them with commodities at prices that cannot return a profit here, but returning handsome profits to the company or trader so setting up the local companies.

(2) That the Income Tax Acts coupled with the Assessment Acts which they incorporate are laws imposing taxation. The relevant Acts are the *Income Tax Act* 1921 (No. 33); which incorporates the Assessment Act 1915-1918 and imposes tax for the financial year beginning on 1st July 1921; the *Income Tax Act* 1922 (No. 38), which incorporates the Assessment Act of 1922 and imposes tax for the financial year beginning on 1st July 1922, and the *Income Tax Act* 1924 (No. 50), which incorporates the Assessment Act 1922-1924 and imposes tax for the financial year beginning on 1st July 1924—which is not relevant to *Munro's Case*, but is relevant to the *Imperial Oil Co.'s Case*. These Tax Acts are, in my opinion, laws imposing taxation, and fall within the scope of sec. 55 of the Constitution. The time when these Acts were respectively passed is the time which must be regarded in applying the test of sec. 55; but it must be observed that the Assessment Act No. 28 of 1925 was not in force at the time of the passing of the Tax Act No. 50 of 1924, though in some respects it applied retroactively.

(3) That the Assessment Acts or the Tax Acts incorporating the Assessment Acts contravene the provisions of sec. 55 of the Constitution in that they deal with other matters than the imposition of taxation. As was said in *Osborne's Case* (1), however, the constitutional provision is that laws imposing taxation shall deal only with the imposition of taxation, and is not that they shall only impose taxation. Consequently, in my opinion, it is not unlawful to include in a taxing Act provisions incidental and auxiliary to the assessment and collection of the tax. This would include provisions for administration, returns, assessments, reviews of

(1) (1911) 12 C.L.R. 321.

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assessments and so forth. The Assessment Acts are not by themselves, as already indicated, laws imposing taxation, and neither they nor the Tax Acts which incorporate them deal with any matter other than the imposition of taxation.

(4) That the Assessment Acts and the Tax Acts incorporating the Assessment Acts contravene the provisions of sec. 55 in that they deal with more than one subject of taxation. The main attack was directed against sec. 28 of the Assessment Act 1922-1925, which is also incorporated in the Tax Acts for the financial years 1922, 1923 and 1924 (Tax Acts No. 38 of 1922, No. 26 of 1923, No. 50 of 1924). The section, it was argued, makes subject to taxation that which is not income: it is expressly imposed upon the basis that there is no taxable income. Again, the tax is upon the person carrying on the business and not upon the person making the income. It is quite true that the Acts impose a tax upon incomes, upon something that comes in; but, as has been said, income is as large a word as can be used to denote a person's receipts. The Acts contain no definition of the word income, and its meaning must be gathered from the text of the Acts themselves. It is clear, however, that various standards and methods are set up for arriving at taxpayers' receipts. The provisions of sec. 16 illustrate the matter.

Now sec. 28, it appears to me, is but another illustration of the same thing. It assumes that the ordinary methods of the Act for assessing income are inapplicable to the case and then sets up another method for determining in certain cases what comes in to a certain class of taxpayers. It is based upon the total receipts of a business, upon what comes in to the business. The method is arbitrary and artificial, but it is only a means devised by the Legislature for getting at a taxpayer's income. The Acts deal with one subject of taxation, but ascertain or estimate the receipts of taxpayers by diverse methods.

The other contention is untenable. The subject of the tax is not the less an income tax because the Legislature fastens upon the person who carries on the business and is amenable to the territorial jurisdiction as the person assessable and chargeable in respect of the income derived from the business he carries on.

This view, however, led to another contention—that sec. 28 operated extra-territorially and was therefore beyond the competence of the Parliament. Such cases as *Macleod* v. *Attorney-General* (1) show, however, that a proper interpretation of the Act would limit the receipts within its scope to receipts within the competence of the Legislature, namely, to those earned or derived in Australia.

The questions stated by *Macfarlan* J. in the *British Imperial Oil Co.'s Case* should therefore be answered as follows: (1) No; (2) Yes.

In *Munro's Case* the merits remain for consideration. Munro carried on in Elizabeth Street, Melbourne, the business of a manufacturer and indentor, and he also owned some rent-producing freehold land in Elizabeth Street. He was minded to start another business in Sydney. Accordingly a company was incorporated under the *Companies Act* with a capital divided into shares of £1 each. Two thousand of these shares were allotted to Munro, and nine thousand to each of his two sons. Munro borrowed the money necessary to pay up these shares from his banker, and secured these advances by mortgages of his Elizabeth Street property to the bank. He then claimed to deduct the sum paid for interest on these advances from his total assessable income for the purposes of the Income Tax Acts. The Commissioner disallowed this deduction but a Board of Appeal or Review allowed it. The only reason given for this decision is that stated by a member of the Board, namely, that the taxable income from the property in Melbourne was what was left after all necessary outgoings had been discharged.

Now, the Assessment Act 1922, sec. 23 (1) (*a*), permits a taxpayer to deduct from his total assessable income "all losses and outgoings (not being in the nature of losses and outgoings of capital) including . . . interest and expenses actually incurred in gaining or producing the assessable income," and sec. 25 (*e*) prohibits any deduction in respect of "money not wholly and exclusively laid out or expended for the production of assessable income" (see also Assessment Act 1915-1918, secs. 18 and 20 (*e*)). The interest paid in this case was upon moneys borrowed for the purpose of contributing capital on the part of the taxpayer and his son to a newly formed

(1) (1891) A.C. 455.

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company. It was not an outgoing by means of which the taxpayer procured the use of money whereby he made any income (see *Ward & Co.* v. *Commissioner of Taxes (N.Z.)* (1); *Farmer* v. *Scottish North American Trust Ltd.* (2)). Under these circumstances the deduction ought not to be allowed.

An appeal only lies to this Court if the decision of the Board involves, in the opinion of this Court, a question of law: but whether there is any evidence upon which it was possible for the Board to come to its conclusion, in point of fact, has long been held a question of law (*American Thread Co.* v. *Joyce* (3)).

There is no evidence, in my opinion, which supports the conclusion of the Board, and the appeal in *Munro's Case* should, therefore, be allowed.

My brother *Gavan Duffy* desires me to say that he concurs in the answers I have given to the questions stated in the case of the British Imperial Oil Co., and also in the view that the legislation attacked in both cases is within the competence of Parliament; but he does not find it necessary to express any opinion upon the accuracy of the judgment of this Court in the *British Imperial Oil Co.'s Case* (4). As he was not a member of the Bench which heard the arguments as to the deduction claimed by Munro from his assessable income, he does not express any opinion upon that point.

Federal Commissioner of Taxation v. Munro.—*Both appeals allowed. Decisions of Board of Appeal discharged and decision of Commissioner restored. Costs before Full Court to be paid by respondent.*

British Imperial Oil Co. v. Federal Commissioner of Taxation.—*Questions answered*: (1) *No*; (2) *Yes. Costs to be paid by appellant.*

Solicitors for Munro, *A. Phillips, Pearce & Just.*

Solicitors for the British Imperial Oil Co., *Gillott, Moir & Ahern.*

Solicitor for the Federal Commissioner of Taxation, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

(1) (1923) A.C. 145, at p. 149.
(2) (1912) A.C., at p. 127.
(3) (1911-13) 6 Tax Cas. 1, 163.
(4) (1925) 35 C.L.R. 422.